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No. 15077

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

ESSEX WIRE CORPORATION, a Corporation,
Doing Business as ESSEX WIRE CORPO-
RATION OF CALIFORNIA,
Respondent.

Transcript of Record

**Petition for Enforcement of an Order of the
National Labor Relations Board**

FILE

SEP -5 1956

No. 15077

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

ESSEX WIRE CORPORATION, a Corporation,
Doing Business as ESSEX WIRE CORPO-
RATION OF CALIFORNIA,
Respondent.

Transcript of Record

**Petition for Enforcement of an Order of the
National Labor Relations Board**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

MARCEL MALLET-PREVOST,

Assistant General Counsel,

National Labor Relations Board,

Washington 25, D. C.,

For Petitioner, National Labor
Relations Board.

HOLT, MACOMBER & GRAHAM,

WILLIAM H. MACOMBER,

San Diego Trust & Savings Building,

San Diego 1, California,

For Respondent, Essex Wire Corp.

Form NLRB-501.

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No. 21-CA-1921.

Date Filed: 2/12/54.

Compliance Status Checked by:

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer Against Whom Charge Is Brought:

Name of Employer: Essex Wire Corporation of California.

Number of Workers Employed: 300.

Address of Establishment: 1305 Harbor Drive,
San Diego, California.

Type of Establishment: Factory.

Identify Principal Product or Service: Automotive wiring.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3), of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

The Company discharged Romaldo Baca, Jr., on or about December 12, 1953, and Ann Hamilton on or about February 11, 1954, for the purpose of discouraging membership in United Mine Workers of America, District 50.

By these acts and by other acts and statements, the Company has interfered with the rights of employees guaranteed in Section 7 of the National Labor Relations Act, as amended.

3. Full Name of Person Filing Charge:

Ann Hamilton.

4. Address: 1219 - 17th Street, San Diego, California.

Declaration

I declare that I have read the above charge and

that the statements therein are true to the best of my knowledge and belief.

By /s/ ANN HAMILTON,
An Individual.

February 12, 1954.

Admitted in evidence as General Counsel's Exhibit No. 1-A, August 2, 1954.

United States of America
Before the National Labor Relations Board

Case No. 21-CA-1921

In the Matter of:

ESSEX WIRE CORPORATION OF CALIFORNIA

and

ANN HAMILTON, an Individual.

COMPLAINT

It having been charged by Ann Hamilton, an individual, that Essex Wire Corporation of California, hereinafter called the Respondent, has engaged in, and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, Public Law 101, 80th Congress, First Session, hereinafter called the Act; the General Counsel of the National Labor Relations Board, on behalf of the Board, by

the Acting Regional Director for the Twenty-first Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

1. Essex Wire Corporation of California, hereinafter called the Respondent, is engaged in the manufacture and sale of wire products at plants in Anaheim and San Diego, California. During the 12-month period ending June 1, 1954, the Respondent sold products manufactured at its plant in San Diego, California, in the value of in excess of \$100,000 to customers who, in turn, each sold their products in the value of in excess of \$25,000 annually to points outside the State of California. In addition, the Respondent sold in excess of \$100,000 in value of its products to customers directly outside the State of California.

2. The Respondent is, and at all times material herein, has been engaged in commerce within the meaning of the Act.

3. In the course and conduct of its business, as described in paragraphs 1 and 2 above, the Respondent, on or about January 14, 1954, posted a Company rule to the effect that no working or Company time could be used for union campaigning or organizational efforts.

4. Respondent, beginning on a date uncertain but approximately November 20, 1953, discriminatorily transferred Elizabeth Ann Hamilton, hereinafter described as Ann Hamilton, from her regular

employment as a taping machine operator to various other employments of a more difficult and disagreeable character by reason of her concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection as defined in Section 7 of the Act, and caused her to leave the plant on or about February 10, 1954, by reason of such discriminatory work assignments, and used this occasion as the pretext for effecting her discharge.

5. Respondent, while engaged in its business as described in paragraphs 1 and 2 above, on or about February 11, 1954, did discharge Elizabeth Ann Hamilton, also known as Ann Hamilton, and does now refuse and fail to re-employ her for the reason that she engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection as defined in Section 7 of the Act.

6. (a) Respondent, by its officers, agents and employees, while engaged in its business as described in paragraphs 1 and 2 above, discriminatorily enforced its no-solicitation rule described in paragraph 3 above in the following regards:

(1) By the statement of General Foreman K. W. King to Ann Hamilton on or about February 8, 1954, directing her to remove her United Mine Worker Union button, hereinafter described as UMW button, on the grounds that it is campaigning, while not making the same requirement from

other employees wearing International Association of Machinists Union buttons, hereinafter called IAM buttons.

(2) By Foreman Milton W. Kresin, requiring Hamilton to remove the UMW button on February 10, 1954, while not making the same requirement from employees wearing IAM buttons.

(3) By General Manager M. J. Simon, on or about February 8, 1954, directing Gerald W. Pipmeier to remove his UMW button, and directing James C. Hamilton to remove his UMW button on or about February 10, 1954, while not directing IAM adherents to remove their IAM buttons.

(4) By the acquiescence of M. J. Simon to the circulation of petitions by the IAM supporters on company time in violation of the posted rule during late January and early February, 1954, and his acquiescence to circulation of cards or petitions by Goldie Riggins, known to him to be an IAM committeewoman, by which cards or petitions employees were urged to retract their designation of UMW.

6. (b) Respondent, by its officers, agents and employees, unlawfully enforced the no-solicitation rule described in paragraph 3 above in the following regards:

(1) By the demand of Foreman Casey that James A. Juhl turn over to Casey signed application or union designation cards on behalf of the UMW secured by Juhl during nonworking time

under penalty of discharge at a date not certain, but believed to be in the early part of January, 1954.

(2) By the statement of Simon to Juhl, at a date not certain, but believed to be approximately one week after the incident recounted in paragraph 6 (b) (1) above, that solicitation must not take place during rest periods because they are company time.

(3) By Simon warning Juhl on or about February 17, 1954, that he was campaigning on company time and property, which warning was directed to remarks which Juhl had made on February 16 to employees on nonworking time.

7. Respondent, by its acts, as set forth in paragraphs 4 and 5 above, did discriminate in regard to hire and tenure of employment of its employees and has thereby engaged in and is thereby engaging in unfair labor practices within the meaning of Section 8 (a), subsection (3) of the Act.

8. Respondent, by its acts as set forth in paragraphs 4, 5, 6 (a) and 6 (b) above, did interfere, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8 (a), subsection (1) of the Act.

9. The activities of Respondent, as set forth in paragraphs 4, 5, 6 (a) and 6 (b) above, occurring in connection with Respondent's operations described in paragraphs 1 and 2 above, have a close,

intimate and substantial relation to trade, traffic and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

10. The activities of Respondent, as set forth in paragraphs 4, 5, 6 (a) and 6 (b) above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a), subsections (1) and (3), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Twenty-first Region, on this 17th day of June, 1954, issues this Complaint against Essex Wire Corporation of California, Respondent herein.

[Seal] /s/ GEO. A. YAGER,
Acting Regional Director, National Labor Relations
Board, Twenty-first Region.

Admitted in evidence as General Counsel's Exhibit No. 1-C, August 2, 1954.

Form NLRB-501.

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 21-CA-2035.

Date Filed: 7/7/54.

Compliance Status Checked by:

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer Against Whom Charge Is Brought:

Name of Employer: Essex Wire Corporation of California.

Number of Workers Employed: Over 100.

Address of Establishment: 1305 Harbor Drive,
San Diego, California.

Type of Establishment: Factory and Assembly.

Identify Principal Product or Service: Automotive Wiring Assemblies.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and 8 (a) 3 and 8 (a) 4 of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

On or about the date of June 4, 1954, I was discharged discriminately and without just cause and was interfered with and restrained in the exercise of my rights guaranteed in Section 7 of the Act. I was discriminated against in regard to tenure, terms and conditions of employment which tended to discourage my membership in a labor organization and was further discriminated against because of having given testimony under the Act.

3. Full Name of Party Filing Charge:

Lorraine Evans.

4. Address:

7439 Jamacha Road, San Diego, California.
Telephone No.: M-4-6206.

Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ LORAIN L. EVANS,
(Signature of Person Filing
Charge.)

Date:

Admitted in evidence as General Counsel's Exhibit No. 1-G, August 2, 1954.

United States of America
Before the National Labor Relations Board
Case No. 21-CA-1921

ESSEX WIRE CORPORATION, d/b/a ESSEX
WIRE CORPORATION OF CALIFORNIA,
and
ANN HAMILTON, an Individual.

Case No. 21-CA-2035

ESSEX WIRE CORPORATION, d/b/a ESSEX
WIRE CORPORATION OF CALIFORNIA,
and
LORAIN L. EVANS, an Individual.

ORDER CONSOLIDATING CASES AND
NOTICE OF HEARING

The General Counsel of the National Labor Relations Board having duly considered the matter and

deeming it necessary in order to effectuate the purposes of the National Labor Relations Act, as amended, and to avoid unnecessary costs or delay,

Hereby Orders, pursuant to Section 102.64 (b) of the National Labor Relations Board Rules and Regulations, Series 6, as amended, that these cases be, and they hereby are, consolidated.

Please Take Notice that on the 2nd day of August, 1954, at 10:00 a.m., D.S.T., in Room 324, Land Title Building, Third and Broadway, San Diego, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the First Amended and Consolidated Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Copies of the Charges upon which the First Amended and Consolidated Complaint is based are attached hereto.

You are further notified that, pursuant to Section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of a verified answer to the said First Amended and Consolidated Complaint within ten (10) days from the service hereof and that unless you do so all of the allegations in the First Amended and Consolidated Complaint shall be deemed to be true and may be so found by the Board.

In Witness Whereof, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Order Consolidating Cases and Notice of Hearing and First Amended and Consolidated Complaint to be signed by the Acting Regional Director for the Twenty-First Region on this 21st day of July, 1954.

[Seal] /s/ GEORGE A. YAGER,
Acting Regional Director, National Labor Relations
Board, Twenty-First Region.

United States of America
Before the National Labor Relations Board

[Title of Cause.]

FIRST AMENDED AND CONSOLIDATED
COMPLAINT

It having been charged by Ann Hamilton, an individual, and Loraine L. Evans, an individual, that Essex Wire Corporation, d/b/a Essex Wire Corporation of California, hereinafter called the Respondent, has engaged in, and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, Public Law 101, 80th Congress, First Session, hereinafter called the Act; the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Twenty-First Region, designated by

the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this First Amended and Consolidated Complaint and alleges as follows:

1. Essex Wire Corporation, a Michigan corporation, hereinafter called the Respondent, is engaged in the manufacture and sale of wire products in various states of the United States including Michigan and California. At its San Diego, California, plant, where the unfair labor practices hereinafter described occurred, the Respondent, d/b/a Essex Wire Corporation of California, during the 12-month period ending June 1, 1954, manufactured and sold products valued at more than \$100,000 to purchases outside the State of California. During the same period the Respondent, considered as a multi-state chain, sold more than \$250,000 in value of its products which were shipped by it from its various plants to points outside of the state in which the plant in question was located. During the same period the San Diego plant sold more than \$200,000 of its products to firms in California, which products were ultimately shipped outside the State of California.

2. The Respondent is, and at all times material herein, has been engaged in commerce within the meaning of the Act.

3. In the course and conduct of its business, as described in paragraphs 1 and 2 above, the Respondent, on or about January 14, 1954, posted a Com-

pany rule to the effect that no working or company time could be used for union campaigning or organizational efforts.

4. Respondent, beginning on a date uncertain but approximately November 20, 1953, discriminatorily transferred Elizabeth Ann Hamilton, hereinafter described as Ann Hamilton, from her regular employment as a taping machine operator to various other employments of a more difficult and disagreeable character by reason of her concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection as defined in Section 7 of the Act, and caused her to leave the plant on or about February 10, 1954, by reason of such discriminatory work assignments, and used this occasion as the pretext for effecting her discharge.

5. Respondent, while engaged in its business as described in paragraphs 1 and 2 above, on or about February 11, 1954, did discharge Elizabeth Ann Hamilton, also known as Ann Hamilton, and did discharge Loraine L. Evans on or about June 4, 1954, and does now refuse and fail to re-employ them for the reason that they engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection as defined in Section 7 of the Act.

6. (a) Respondent, by its officers, agents and employees, while engaged in its business as described in paragraphs 1 and 2 above, discriminatorily

enforced its no-solicitation rule described in paragraph 3 above in the following regards:

(1) By the statement of General Foreman K. W. King to Ann Hamilton on or about February 8, 1954, directing her to remove her United Mine Worker Union button, hereinafter described as UMW button, on the grounds that it is campaigning while not making the same requirement from other employees wearing International Association of Machinists Union buttons, hereinafter called IAM buttons.

(2) By Foreman Milton W. Kresin, requiring Ann Hamilton to remove the UMW button on February 10, 1954, while not making the same requirement from employees wearing IAM buttons.

(3) By General Manager M. J. Simon, on or about February 8, 1954, directing Gerald W. Pipmeier to remove his UMW button, and directing James C. Hamilton to remove his UMW button on or about February 10, 1954, while not directing IAM adherents to remove their IAM buttons.

(4) By the acquiescence of M. J. Simon to the circulation of petitions by the IAM supporters on company time in violation of the posted rule during late January and early February, 1954, and his acquiescence to circulation of cards or petitions by Goldie Riggins, known to him to be an IAM committeewoman, by which cards or petitions employees were urged to retract their designation of UMW.

6. (b) Respondent, by its officers, agents and employees, unlawfully enforced the no-solicitation

rule described in paragraph 3 above in the following regards:

(1) By the demand of Foreman Casey that James A. Juhl turn over to Casey signed application or union designation cards on behalf of the UMW secured by Juhl during nonworking time under penalty of discharge at a date not certain, but believed to be in the early part of January, 1954.

(2) By the statement of Simon to Juhl, at a date not certain, but believed to be approximately one week after the incident recounted in paragraph 6 (b) (1) above, that solicitation must not take place during rest periods because they are company time.

(3) By Simon warning Juhl on or about February 17, 1954, that he was campaigning on company time and property, which warning was directed to remarks which Juhl had made on February 16 to employees on nonworking time.

7. Respondent, by its acts, as set forth in paragraphs 4 and 5 above, did discriminate in regard to hire and tenure of employment of its employees and has thereby engaged in and is thereby engaging in unfair labor practices within the meaning of Section 8 (a), subsection (3) of the Act.

8. Respondent, by its acts as set forth in paragraphs 4, 5, 6 (a) and 6 (b) above, did interfere, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act,

and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8 (a), subsection (1) of the Act.

9. The activities of Respondent, as set forth in paragraphs 4, 5, 6 (a) and 6 (b) above, occurring in connection with Respondent's operations described in paragraphs 1 and 2 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

10. The activities of Respondent, as set forth in paragraphs 4, 5, 6 (a) and 6 (b) above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a), subsections (1) and (3), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Twenty-First Region, on this 21st day of July, 1954, issues this First Amended and Consolidated Complaint against Essex Wire Corporation d/b/a Essex Wire Corporation of California, Respondent herein.

[Seal] /s/ GEORGE A. YAGER,
Acting Regional Director, National Labor Relations Board, Twenty-First Region.

Admitted in evidence as General Counsel's Exhibit No. 1-H, August 2, 1954.

United States of America Before the
National Labor Relations Board

[Title of Cause.]

ANSWER OF ESSEX WIRE CORPORATION

Now comes Essex Wire Corporation, a Michigan Corporation, authorized to do business in the State of California, by and through its attorney, Walter F. Probst, and, for answer to the complaint charged in the above cause, answers as follows:

1. Essex Wire Corporation does deny each and every allegation contained in said paragraph 1.

2. Essex Wire Corp. submits that due to the National Labor Relations Board's recent enunciation of policy regarding jurisdiction, there is serious doubt that Respondent has been engaged in commerce within the meaning of the National Labor Relations Act.

3. Essex Wire Corp. does deny each and every allegation contained in said paragraph 3.

4. Essex Wire Corp. does deny each and every allegation contained in said paragraph 4.

5. Essex Wire Corp. does deny each and every allegation contained in said paragraph 5.

6. Essex Wire Corp. does deny each and every allegation contained in said paragraph 6, and in each of the paragraphs and sub-paragraphs contained thereunder.

7. Essex Wire Corp. does deny each and every allegation contained in said paragraph 7, and does further deny that it has engaged in an unfair labor practice within the meaning of Section 8(a), subsection (3) of the Act.

8. Essex Wire Corp. does deny each and every allegation contained in said paragraph 8, and does further deny that it has engaged in an unfair labor practice within the meaning of Section 8(a), subsection (1) of the Act.

9. Essex Wire Corp. does deny each and every allegation contained in said paragraph 9.

10. Essex Wire Corp. does deny each and every allegation contained in said paragraph 10.

ESSEX WIRE CORPORATION,
TION,

By /s/ WALTER F. PROBST,
Its Attorney.

Duly Verified.

Admitted in evidence as General Counsel's Exhibit No. 1-J, August 2, 1954.

United States of America Before the
National Labor Relations Board

[Title of Cause.]

ANSWER TO FIRST AMENDED AND
CONSOLIDATED COMPLAINT

Comes now the Respondent, Essex Wire Corporation of California, and answering the First

Amended and Consolidated Complaint herein, admits, denies and alleges:

I.

The Respondent admits the allegations contained in paragraphs 1, 2 and 3.

II.

Answering the allegations of paragraph 4, this Answering Respondent admits that Elizabeth Ann Hamilton was transferred at various times during the course of her employment; this Answering Respondent denies that she was discriminatorily transferred and alleges that her transfers were made at her request; this Answering Respondent alleges that her last transfer prior to abandonment by her of her employment was a temporary measure to fill a vacancy occasioned by the absence of another employee; except as hereinabove specifically admitted, Answering Respondent denies each and every, all and singular, of the allegations therein contained; this Answering Respondent particularly denies that they caused her to leave the plant on or about the date therein alleged and alleges that she left of her own accord and without permission from any of the authorities of the said Respondent.

III.

Answering the allegations in paragraph 5, this Answering Respondent admits that Ann Hamilton was discharged, but alleges that the discharge was for cause and for no other reason; this Answering Respondent alleges that the cause of her discharge

was her abandonment of her job with the said Respondent; except as hereinabove specifically admitted, this Answering Respondent denies all and singular of the allegations therein contained.

IV.

Answering the allegations of paragraph 6(a), Respondent admits that the no-solicitation rule described in paragraph 3 of the said complaint was enforced by the said company; this Answering Respondent denies that it was enforced discriminatorily.

V.

This Answering Respondent does not have sufficient information or belief to answer the allegations of paragraph 6(a) (1), and basing its denial upon that ground, denies each and every, all and singular, of the allegations therein contained.

VI.

This Answering Respondent does not have sufficient information or belief to enable it to answer the allegations of paragraph 6 (a) (2), and basing its denial upon that ground, denies each and every, all and singular, of the allegations therein contained.

VII.

Answering the allegations of paragraph 6 (a) (3), this Answering Respondent denies each and every, all and singular, of the allegations therein contained.

VIII.

Answering the allegations of paragraph 6 (a) (4), this Answering Respondent denies each and every, all and singular, of the allegations therein contained.

IX.

Answering the allegations of paragraph 6 (b), this Answering Respondent admits that it enforced the no-solicitation rule, but denies that it was unlawfully enforced.

X.

Answering the allegations of paragraph 6 (b) (1), this Answering Respondent admits that he demanded of James A. Juhl that he turn over certain cards that James A. Juhl was using during working hours and attempting to secure applications during working hours. That the demand was made by Foreman Casey to enable the said James A. Juhl to work for the said Respondent under his contract of employment and not attempt to campaign for Union membership on company time; that the said James A. Juhl refused to turn over the said cards to the said Foreman Casey; that if the said cards had been surrendered to the said Foreman Casey, they would have been returned to the said James A. Juhl upon completion of his hours of employment with the said Respondent.

XI.

Answering the allegations of 6 (b) (2), this Answering Respondent admits the allegations therein contained.

XII.

Answering the allegations of 6 (b) (3), this Answering Respondent denies each and every, all and singular, of the allegations therein contained.

XIII.

Answering the allegations of paragraph 7, this Answering Respondent denies each and every, all and singular, of the allegations therein contained.

XIV.

Answering the allegations of paragraph 8, this Answering Respondent denies each and every, all and singular, of the allegations therein contained.

XV.

Answering the allegations of paragraph 9, this Answering Respondent denies each and every, all and singular, of the allegations therein contained; this answering Respondent particularly denies that it has done any act tending to lead the labor disputes burdening and obstructing commerce and the free flow of commerce.

XVI.

Answering the allegations of paragraph 10, this Answering Respondent denies each and every, all and singular, of the allegations therein contained; this Answering Respondent particularly denies that it has done any act which could be constituted an unfair labor practice.

Wherefore, this Answering Respondent prays that the complaint be dismissed forthwith and that

the Respondent be exonerated of the claims hereinabove made.

WILLIAM H. MACOMBER &
FRANKLIN B. ORFIELD,
Attorneys for Respondent.

Duly verified.

Admitted in evidence as General Counsel's Exhibit No. 1-K, August 2, 1954.

United States of America Before the National
Labor Relations Board

[Title of Cause.]

INTERMEDIATE REPORT AND
RECOMMENDED ORDER

Statement of the Case

Upon charges duly filed and served, the General Counsel of the National Labor Relations Board, in the name of the Board, caused the Regional Director of its Twenty-First Region, at Los Angeles, California, to issue a complaint on June 17, 1954, and a First Amended and Consolidated Complaint on July 21, 1954, under Section 10 (b) of the National Labor Relations Act, as amended. 61 Stat. 136. The Respondent therein, Essex Wire Corporation, was charged with the commission of certain unfair labor practices under Section 8 (a) (1) and (3) of the statute. Copies of the first charge, the original complaint in the case, the second charge,

the Director's original Order of Consolidation and Notice of Hearing, and the First Amended and Consolidated Complaint were duly served upon the Respondent. And the Respondent—in its turn—then filed an answer admitting certain jurisdictional allegations of the Consolidated Complaint, but denying the commission of the unfair labor practices charged.

The First Amended and Consolidated Complaint, as further amended subsequently, alleges in substance—and the answer denies—that the Respondent, on February 10, 1954, discriminatorily transferred Elizabeth Ann Hamilton from her regular job to one of a more difficult and disagreeable character, because of her participation in concerted activity for the purposes of collective bargaining and other mutual aid and protection; that the Respondent caused her to leave its plant on or about February 10, 1954, by reason of the discriminatory work assignment; and that the Respondent utilized such action on her part, on or about the 11th of February, as a pretext for her discharge. The Consolidated Complaint, as amended, also alleges—and the Respondent's answer denies—that Loraine L. Evans was discharged on or about June 4, 1954, and that she and Mrs. Hamilton had been refused re-employment because of their participation in concerted activity for the purposes of collective bargaining and other mutual aid or protection. The Respondent is also charged with—and denies—the discriminatory and unlawful enforcement of a valid

plant rule, intended to prohibit union organizational activity on company time. Its entire course of conduct, the General Counsel charges, involved discrimination in regard to the hire and employment tenure of its employees, and interference, restraint and coercion of its employees in connection with their exercise of rights statutorily guaranteed.

Pursuant to notice, a hearing was held before me, as a duly designated Trial Examiner, at San Diego, California, from August 2, 1954, to August 5, 1954, both dates inclusive. The Respondent was represented by counsel; Mrs. Hamilton and Mrs. Evans, the Complainants in the case, filed appearances in their own behalf. Each of the parties was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues.

At the outset of the case, as noted, the case caption was amended, by mutual consent, to show the proper corporate name of the Respondent; several additional substantive amendments, of a minor character, were offered on behalf of the General Counsel and approved without objection.

At the conclusion of the testimony, the Respondent moved for a dismissal of "both the complaints" for lack of proof; no ruling was announced, however, and my disposition of the motions will appear in this report. The parties waived their right to oral argument, but a brief has been received from the Respondent, and the General Counsel's representative has submitted a memorandum.

Upon the entire record in the case, and my observation of the witnesses, I make the following findings of fact.

Findings of Fact

I.

The Business of the Respondent

Essex Wire Corporation, a Michigan corporation doing business as The Essex Wire Corporation of California, is engaged in the manufacture and sale of wire products in various states of the United States, including Michigan and California. It maintains plants at Anaheim and San Diego, in the latter state; the San Diego plant is the only one involved in the instant case, however. During the twelve-month period ending on June 1, 1954, the Respondent sold products manufactured at its San Diego plant, valued in excess of \$100,000, to customers outside the State of California. Within the same period, products manufactured at the San Diego plant, valued in excess of \$200,000, were sold to firms in California, which products were ultimately shipped to points outside of the state. As a multistate enterprise the Respondent, during the same period, sold and shipped products valued in excess of \$250,000 from its various plants to points outside the state in which the plant in question was located.

The Respondent admits, and I find, that it is engaged in commerce within the meaning of the Act, as amended. On the basis of the available evidence, and in accordance with the Board's newly

established policy—see Jonesboro Grain Drying Cooperative, 110 NLRB No. 67—I find that the assertion of the Board's jurisdiction in this case is warranted and that it would effectuate the objectives of the statute.

II.

The Labor Organization Involved

The United Mine Workers of America, District 50, unaffiliated—to be designated as the UMW elsewhere in this report—is a labor organization within the meaning of Section 2 (5) of the Act, as amended, which admits employees of the Respondent to membership

(The General Counsel's First Amended and Consolidated Complaint, as previously noted, alleged that the discriminatory transfer of Elizabeth Ann Hamilton from her regular work to other work of a more difficult and disagreeable character, and the subsequent discharge of Mrs. Hamilton and Loraine L. Evans, were undertaken because of their participation in "concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection" as statutorily defined. There are no allegations in the Consolidated Complaint that the Respondent's course of conduct involved discrimination in regard to their hire, employment tenure, or any terms or conditions of their employment to encourage or discourage membership in a labor organization.

Nevertheless, the Consolidated Complaint alleges that the Respondent's course of conduct with respect to these employees involved unfair labor practices within the meaning of Section 8 (a) (3) of the Act, as amended. The record fails to reveal any challenge to the First Amended and Consolidated Complaint, however, expressly grounded in its apparent failure to state a "cause of action" under Section 8 (a) (3) of the statute. And the issue was, in fact, fully litigated. I have, therefore, treated the Consolidated Complaint as one calculated to charge the Respondent with unfair labor practices under Section 8 (a) (3) as well as Section 8 (a) (1) of the Act, as amended, insofar as the Complainants are concerned. And my conclusion with respect to the character of the United Mine Workers of America, District 50, unaffiliated, as herein set forth, constitutes, of course, a necessary prerequisite to any consideration of the issues presented by the Consolidated Complaint thus construed.)

No allegation with respect to the UMW's status as a labor organization, it is true, appears in the First Amended and Consolidated Complaint, and no evidence specifically calculated to establish its status as such was, in fact, offered. On the basis of Board decisions too numerous to cite, however, I have taken official notice of its existence as an organization in which employees participate, and of the fact that it exists for the purpose, in whole or in part, of

dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Hence my conclusion with respect to its status, as noted.

The Respondent, at various times, adverted to the UMW as an "unauthorized" union, which has failed or refused to meet the compliance requirements established in Section 9 (f), (g) and (h) of the Act, as amended. For purposes of the instant case, however, it may be taken as datum that a failure to effect "compliance" with the statute, under the subsections cited, does not, of itself, operate to deprive any voluntary association of its character as a labor organization under Section 2 (5) of the Act, as amended. *N. L. R. B. v. Pratt, Read and Company*, 191 F. 2d 1006, 29 LRRM 2025, 2026 (C. A. 2), enforcing 90 NLRB 1499. And I so find.

In his brief, however, the Respondent's counsel now argues that the Complainants—Elizabeth Ann Hamilton and Loraine L. Evans—were "fronting" for the UMW at all material times, and that their charges should therefore be dismissed. If the contention thus spelled out represents an argument that the Complainants have no rights under the statute because they "actively organized" the Respondent's employees in behalf of a non-complying union, it must be rejected on the basis of the authority just noted. *N. L. R. B. v. Pratt, Read and Company*, *supra*. If, however, the Respondent wishes to contend that the complainants were acting in behalf of the UMW when they filed the charges in this case,

the contention must be rejected as factually and legally insupportable. Nothing in the charges, the First Amended and Consolidated Complaint, or the evidence, suggests an attempt, in this case, to vindicate or assert any right or interest of the Mine Workers as a labor organization under the statute. The cases cited in behalf of the Respondent's contention, can only be characterized as inapposite. *N. L. R. B. v. Beaver Meadow Creamery*, 215 F. 2d 247, 34 LRRM 2715, 2716 footnote 4, (C. A. 3) and the cases therein cited. I find the contention, therefore, without merit.

III.

The Unfair Labor Practices

A. The Respondent's Plant Organization

The Respondent's San Diego plant, involved in the instant case, operates under the supervision of Mr. Mitchell J. Simon, its Pacific Coast production manager. Immediately subordinate to Production Manager Simon, Mr. Fred Harms functions as plant superintendent. Under Plant Superintendent Harms there are three general foremen; only one of these however, Kenneth King, played a significant part in the events with which this case is concerned. Under its general foremen, also, the Respondent employs more than six assistants or section foremen, otherwise designated in the record as department foremen. Only two of these, Melvin Kresin and Clyde Casey, appear to have been involved in the situation now under consideration.

(Kresin, in charge of the "finished assembly" department, supervised the employee group which included the Complainants herein. A "chief inspector" not otherwise designated in the Respondent's managerial hierarchy also supervised the work of Mrs. Evans as a checker.)

The employee group supervised by Kresin, the record shows, may number forty at the most; Production Manager Simon's testimony, generally, indicates that he supervises "over thirty" employees. Three lead women function under Kresin. At all material times, this group included Helen Greenwood, the lead woman of a group which includes approximately 15 employees, and Peggy Reddin, the lead woman of a group which fluctuates in size from 10 to 20 employees.

(Production Manager Simon's testimony, which stands in the record without contradiction, indicates that these lead women spend more than 80 per cent of their time in actual production. The Respondent does not consider them supervisors. They are hourly paid. Simon characterized Greenwood as a "service" girl who supplies the other girls working on the firm's large rotary conveyor—an assembly line—with the materials they need and relieves them whenever they have to leave the conveyor table. Other evidence in the record, however, establishes that she may also direct employees to take particular stations on the conveyor, on occasion, and that she is authorized to call upon

another "all around" girl, Betty Cave, to handle relief assignments and bring supplies.)

At the time of the events with which we are now concerned, the San Diego plant was engaged, among other things, in the manufacture and assembly of "cowl harnesses" for use in passenger automobiles. These harnesses, the record shows, contain a group of insulated wires, each fitted with appropriate metal connectors; they are assembled in conformity with a predetermined pattern, bound with an overall coat of plastic, and shipped for insertion and attachment under the dashboard of some particular make and style of passenger car. Production Manager Simon's undenied and credible testimony indicates that the average harness manufactured, at all times material, contained approximately thirty-two wires, most of them with appropriate attachments—a block, terminal, connector, switch, or circuit breaker, and so forth.

In the "finished assembly" department, under Kresin's supervision, Peggy Redden served, I find, as the lead woman of an employee group which operated individual "taping" machines to coat certain wires with plastic tape, and a small rotary conveyor or assembly line devoted to the fabrication of harness sub-assemblies. Greenwood, the record shows, functioned as the lead woman at a large "rotary conveyor" table. Essentially, the productive unit thus designated appears to be a large, continuously moving, assembly line with "jigs" upon which individually taped wires and wire sub-assemblies are

fitted in connection with the final assembly operation. Production Manager Simon described the operation as follows:

. . . a group of girls around the rotary table, each girl has a station. Each girl does a particular operation and starting out, No. 1 station gets completely around the table. [After] all stations have been fulfilled [the] harness finished is removed from the conveyor and put on the overhead conveyor . . . This is a final assembly and they will put these wires on a jig. The jig is all laid out and the wires fit in certain places. They will put these wires on consecutively going down the table as the jig passes their station. Then as it makes the turn and goes to the reverse side of the table . . . the harnesses are then taped with the plastic tape . . . then, as it makes the final turn, there is a girl, the last girl . . . who removes this harness physically from the jig.

After removal, at the "take-off" station, each harness is suspended from a hook on an overhead conveyor, slightly to the rear; it is carried by the overhead conveyor to other employees for the addition of certain attachments, then to an oven which bakes its plastic coating to a "homogenous" state, then to the firms' "inspection" area in which defective items are tagged and removed for repair, and finally to the shipping department in which they are removed for packaging and shipment.

B. Employee Representation

For a number of years—the exact number being immaterial—the employees at the San Diego plant have been represented, in collective bargaining, by Silvergate District Lodge No. 50 in behalf of Automotive Electric Lodge No. 1930 of the International Association of Machinists. Continuously and at all times material, indeed, that organization has functioned as the exclusive representative of the employees pursuant to a contract with the Respondent; a copy of the agreement received in evidence reveals that it became effective on January 15, 1953, and remained in full force and effect through May 15, 1954. I so find.

(Under this agreement, the Respondent recognized the union—to be designated in this report as the IAM whenever necessary—pursuant to a Board certification issued on July 22, 1948, as the exclusive collective bargaining agency for all of the Respondent's employees except office and clerical workers, guards, professional employees and supervisors as statutorily defined. The agreement also provided for a conventional "thirty day" union shop, and a voluntary check-off with respect to initiation fees and dues.)

Subsequently, as of May 15, 1954, this contract was replaced by a new agreement, scheduled to remain in full force and effect until November 15, 1955. The provisions of the new agreement with respect to the scope of the bargaining unit, the union

shop, and the voluntary checkoff, represent a continuation of previous commitments without change.

C. The Campaign on Behalf of the United Mine Workers

Late in 1953, apparently, several employees of the Respondent became interested in the UMW as a possible bargaining agent. Some discussion of such a change in the bargaining agency appears to have taken place in December of that year, shortly before the holidays.

(Mrs. Hamilton appears to have been active in these discussions. Her husband, J. C. Hamilton, and her sister-in-law, Mrs. Evans, were also interested. All were employed, at the time, in the "finished assembly" department of the plant—Mrs. Hamilton as a taping machine operator, Mrs. Evans as an inspector or checker, and J. C. Hamilton as a packer, James A. Juhl, a maintenance mechanic, also appears to have become interested in UMW representation at the same time. I so find.)

Mrs. Evans was designated as the chairman of an organizational campaign in the UMW's behalf. With other employees, she undertook to solicit authorization cards in behalf of that organization, before the holidays and thereafter, at the homes of the employees and at the plant.

(A synthesis of the testimony given with respect to this organizational campaign consist-

ently indicates—at least insofar as the UMW sympathizers are concerned—that the organizational activity at the plant was confined to the free time before and after work, the lunch hour, and the established morning and afternoon rest periods. Their testimony indicates that the UMW adherents, upon a few occasions, may have accepted executed authorization cards proffered by their fellow employees during working hours, and that they may have answered occasional questions asked, on company time, with respect to the organization. As witnesses, however, all of the UMW adherents testified that they had not, themselves, engaged in organizational solicitation or initiated discussions of the campaign on “company” time. This testimony was vigorously disputed. To the extent that the conflict indicated may be material, it will be analyzed elsewhere in this report.)

Early in January, 1954, James A. Juhl helped to distribute UMW “membership” cards. On the day after he initiated this activity he was accosted by his foreman, Clyde Casey. No one else appears to have been present. Juhl’s testimony with respect to their conversation reads as follows:

Well, anyway, I was coming near the punch press line which is right near that part of the factory and Casey called me over. He asked, he says, if I was passing out membership cards for Mine Workers and I said I was. And he says, “Have you got any of them signed?” And

I said, "Yes, I do." And he said, "What are you trying to do, make a fool out of me?" And I said, "No," I didn't know quite what he meant. I said, "No." He said, "Where are the cards?" I told him I had them on me. He said "Don't you like your job here?" I said, "Yes." He said, "Well, I want the cards in my office in five minutes." I didn't know what exactly to do. I took the cards and gave them back to the people on company time on threat of being discharged and went to the office and told him I gave them back to the people. Then he went on to tell me—I gave the cards back to the people—and then he went on to tell me that in order for me to campaign and get another union, I first had to notify the front office of the plant and then I would have to wait until the contract of the IAM expired and have to have a vote on two or more unions to see which came in and that was the end of that meeting.

Juhl's testimony, as quoted, was not specifically challenged in cross-examination, and it has not been denied. In general, the maintenance mechanic impressed me as an honest, forthright witness. None of his testimony could be characterized as inherently incredible. With respect to the portion noted, I find it worthy of acceptance.

The UMW's organizational activity, I find, gave rise to considerable discussion and conflict among the employees. Several characterized the situation as one marked by "confusion" and "bickering" with

respect to the right of the UMW adherents to engage in such activity. And Production Manager Simon's testimony, which I credit in this connection, indicates that he became aware of the situation quite early. On a date not set forth specifically, but apparently early in January, he sought advice by telephone from the Respondent's main office in Detroit, Michigan, with respect to the course of conduct he ought to follow. In substance, it would appear that he was advised to follow a "middle course" and to avoid any display of partisanship in the "factional" dispute, but to insist that no organizational activity could be conducted during working hours. And Simon's testimony, which I credit, establishes that the Respondent's supervisors were instructed, orally, to maintain such a policy, and to insist that company time be devoted to work.

(The production manager's testimony also establishes that he was told the firm could do nothing about union buttons and campaign material as long as they were not being "handed from one to another" on the job during working hours.)

The production manager also testified that a group of four employees—presumably IAM adherents—came to see him shortly after his receipt of the instructions indicated. His testimony reveals a complaint on their part with respect to the distress allegedly felt by many employees in regard to the UMW's organizational activity; he was asked, it would appear, whether the Respondent could do any-

thing to ameliorate the situation, presumably by the imposition of some restrictions upon the UMW's campaign. Consistently with his instructions, however. Simon appears to have advised the employees that the Respondent would have to maintain a position of strict neutrality, and that any advice as to the courses of action available to the employees would have to come from their accredited union representatives. The employees were also advised, I find, that the Respondent, under the law, would insist on a prohibition of "campaigning" on company time by either employee group.

(Upon the record as a whole, there may be some question with respect to Simon's attempt to assign a January date to this conversation, immediately subsequent to his receipt of instructions from the Respondent's main office. In the light of the available evidence, however, I am satisfied that the indicated conversation took place, and that it probably took place in January, as the production manager testified.)

At or about the same time—within a day after Simon's Detroit call—he appears to have found an occasion to admonish Gerald W. Pipmeier, a UMW adherent, for receiving a UMW pin from another employee, and for attaching it to his shirt during working hours. The burden of the admonition, as indicated in Simon's undenied testimony, seems to have been that the distribution of union pins or buttons, and their passage from one employee to

another during working hours, constituted campaign activity on company time. And Pipmeier appears to have been told, in effect that his guilt in this connection had not been established by observation, but that he would be well advised to conduct himself in accordance with the indicated rule thereafter. I so find.

(In reaching this conclusion, I have accepted the testimony of the production manager, which stands uncontradicted. I do not believe it to be inherently incredible. Pipmeier, although subpoenaed in the General Counsel's behalf, did not appear as a witness—and the record establishes that he had resigned his position at the plant after the incident in question, to accept other employment, and that he had then sent a written expression of good will to the Respondent's production manager.)

Within two days after his receipt of the instructions previously noted, Simon prepared a notice to be posted on the Respondent's bulletin board. There is some conflict as to whether the notice in question was actually posted, its location, and the date of its appearance. A copy produced for the record, however, indicates that it was prepared for posting on January 14, 1954. And I find, after a reconciliation of the available evidence, that the notice was in fact, posted on that date. It read as follows:

To. All Employees:

It has come to our attention that our employees are engaged in union campaigning dur-

ing working hours. Any such campaigning for any union during working hours is contrary to company rules and, therefore, those involved are subject to disciplinary action.

We request those involved campaigning for any purpose on company time to refrain from: These practices in order that we may not become involved in some undesirable incidents.

Shortly after this notice was posted, Juhl's foreman I find, took him to see the production manager. The employee's version of the conversation that ensued reads as follows:

. . . and he asked me if I was campaigning on company time. And I said, "No, I wasn't campaigning on company time but I was on company property." Well, he told me that we were causing a lot of grief, you know, while the people going up in arms against everybody and things like that and explained to me if I want to campaign to do it off the company property out out of the company time. And I told him I was doing it during lunch hour and rest period and he said the rest period was company time because we were being paid by the company for rest periods.

The maintenance mechanic's testimony also indicates that Simon spoke to him again about one month later, with regard to his participation in the UMW campaign. According to Juhl, the production manager criticized him for allegedly "passing it

around” that employees at the Respondent’s Anaheim plant were getting higher wages per hour than those in San Diego. Simon went on, according to the maintenance mechanic, to explain the basis for any wage differential between the two plants. Juhl’s testimony also indicates that the production manager again admonished him with respect to “campaigning on company time and property” in general terms. The maintenance mechanic, according to his testimony, countered with a question as to whether it was permissible for employees to solicit “retractions” from UMW adherents on company time; Simon’s reply, according to Juhl, was that Goldie Riggins—an official of the IAM local—was allowed to collect dues and process grievances on company time, and that any restriction of her “campaigning” on company time was bottomed upon a gentlemen’s agreement.

The testimony of the production manager, in this connection, was brief. Immediately after a detailed exposition of the warning given to Employee Pipmeier, previously noted, Simon testified that:

I also made that statement to James Juhl in the presence of Mr. Casey and Mr. Lee Baker on two occasions that I didn’t care what they did outside or what union they wanted or who they wanted to represent them but they weren’t going to do it on company time.

In the face of this testimony—which I credit, despite its summary character, for reasons to be

noted elsewhere in this report—I find Juhl’s testimony erroneous, insofar as it purports to indicate a general prohibition of organizational activity on company property during non-working time. The maintenance mechanic did testify, however, to a declaration by the production manager that rest periods would be considered “company” time during which campaigning would be forbidden. This aspect of Juhl’s testimony has not been denied. And I find that Simon, in the course of the conversation indicated, so construed his posted rule with respect to organizational activity.

In view of the IAM’s status as the accredited representative of the employees for a number of years, some of that organization’s “buttons” appear to have been worn at the San Diego plant prior to the advent of any rival organization. With the inception of the UMW organizational activity, however, the employees were apparently urged to wear IAM buttons as a sign of their “loyalty” to that organization. And the record establishes that many did so. J. C. Hamilton, as a witness, also testified, however, that he observed an IAM representative, on one occasion, in the plant during working hours, engaged in the distribution of IAM buttons to the employees. Hamilton dated the incident as of the 1st of February, approximately. Various representatives of the Respondent, as witnesses, denied any knowledge of the indicated button distribution; the packers’ testimony with respect to it, however, has

not been contradicted. I find that the incident, as he described it, occurred.

On Monday, February 8, 1954, pursuant to the advice of a UMW representative, Mr. and Mrs. Hamilton—and possibly others—publicly acknowledged their adherence to that organization by donning UMW buttons at work. Before work started that day, J. C. Hamilton appears to have become involved in an altercation with Jean Rooney, another employee. The latter subsequently complained to her IAM committeewoman, Goldie Riggins, that Hamilton had threatened to “slap” her. And Riggins appears to have reported the incident to Production Manager Simon. Hamilton, at all events, was called in for an explanation.

(He denied the alleged threat, and nothing came of the incident. Production Manager Simon’s remarks with respect to it—upon which all of the witnesses are substantially agreed—reveal no bias, in my opinion, with respect to the underlying “factional” dispute. I have, therefore, refrained from any attempt to set forth the controversy in detail.)

In the course of the conversation that ensued, a question appears to have been raised with respect to Hamilton’s UMW activity. The packer, according to his testimony, denied that he had been campaigning for that organization on company time or company property. Riggins, again according to his testimony, disputed that statement—and Simon, he

testified, declared himself to be aware of his (Hamilton's) organizational activity, and reported that he had also talked to Juhl about such activity on company time. Hamilton's testimony indicates that the production manager then referred to his UMW button and told him to "take it off and leave it off" as long as he was in the plant. Hamilton testified that he did so, and that he was told by Simon that he (Simon) did not wish to see that badge on Hamilton again. Hamilton's further testimony with respect to the incident, then, reads as follows:

... and just as I started along the corner to go back to my station, Mr. Simon told me, called me back and said, "Jimmy, come here. I'm going to give you a warning now. I don't want to hear you signing nobody for the Mine Workers in this plant as long as this is on company property or company time." He said, "I pay you for the break and that is my time," and he said, "I'm giving you this warning now so you can take it." And he said, "I want you to get back in your station and stay there."

As a witness for the Respondent, Production Manager Simon substantially corroborated Hamilton's testimony with respect to their conversation about Jean Rooney's complaint—which I have not troubled to explain in detail. Insofar as the rest of the conversation outlined in Hamilton's testimony is concerned, however, Simon was asked to comment only with respect to the charge that he had told the packer to take his badge off and leave it off, as long

as he was in the plant. This the production manager denied.

Hamilton's testimony with respect to the incident was given in a straightforward manner. I am satisfied that it was honestly given, and that it represents his best recollection. Insofar as it purports to reiterate a contention on the part of the production manager that "break" periods represented company time, during which no UMW organizational activity would be permitted, I am satisfied that it is in accord with the facts. Two questions, however, remain: Did Simon's warning to Hamilton include a sweeping prohibition against organizational activity on company property without regard to the time at which it might take place? And, secondly, did he order Hamilton to remove his UMW button and refrain from its display in the plant thereafter?

Upon the entire record, I find myself persuaded that each of these questions should be answered in the negative. The available evidence establishes, in the absence of effective contradiction, that Production Manager Simon had already conferred with the Respondent's legal department—and that he had been advised, in substance, to pursue a non-partisan policy in the developing conflict, while insisting on the company's right to ban organizational activity during working hours. And I am satisfied that Simon was sincere in his desire to effectuate such a policy. Several of the witnesses who testified at the call of the General Counsel, in fact, recited conversations which strongly suggest—if they do not, in-

deed, establish—a genuine effort on the part of the production manager to maintain a balanced neutral position. Although the record will show, as I have found, that he considered the Respondent's daily rest periods part of the "company time" during which organizational activity might properly be forbidden, I do not believe that a preponderance of the evidence will support a conclusion that he intended the firm's ban on organizational activity to be effective on company property at all times. Nor will a preponderance of the credible evidence, in my opinion, establish that he—the production manager—ever ordered Hamilton or any other employee to remove a UMW button in the plant. I am satisfied that his comments with respect to these buttons were in fact limited, as he testified, to a prohibition of their passage from hand to hand during working hours, on the theory that such a button transfer constituted organizational activity on company time. And it is so found.

On the 8th of February, also, about fifteen minutes after the conversation just noted, Mrs. Evans engaged the production manager in conversation again. The discussion, according to Mrs. Evans, revolved around her complaint with respect to the circulation of a petition in the plant, by the adherents of the incumbent union, which UMW supporters were not allowed to see or sign. Simon was informed, the checker testified, that the petition was being circulated on company time. According to Mrs. Evans also, Simon, in response, indicated merely that he

was aware of the petition, but that he did not know what he would do about it.

(Upon the entire record, there is certainly some doubt as to the character of the petition. Mrs. Evans testified that she had been "told" by one employee that it was addressed to a local "TV" station, and that it had been prepared to serve as a mass request for more polka music to be played by the station in question. She also appears to have been "told" by Committee-woman Riggins, however, that the petition was being circulated only to employees previously in attendance at an IAM union meeting. Production Manager Simon's testimony indicates that the only petition known to him was a petition signed by more than fifty employees, requesting that he grant an audience to them for some unspecified reason; Simon identified that petition, however, as one circulated just before his January conference with an employee delegation, previously noted, in regard to the company's proposed course of conduct with respect to the "confusion" and "dissension" prevalent in the plant. Having found that the conference in question took place immediately prior to the posting of the Respondent's January 14th notice, I am constrained to conclude that the references of Mrs. Evans to a petition currently being circulated may have been grounded in nothing more than anticipatory fear that the "TV" petition had, in fact, been motivated by

the employee opposition to the UMW campaign. The evidence is inconclusive, however. Upon the entire record, therefore, I cannot find that the incident reveals any indifference on the part of management to the conduct of an anti-union campaign on company time, as the General Counsel would seem to suggest.)

The production manager did testify that Mrs. Evans told him about the alleged activities of Dorothy Randall, an official of the incumbent local, in connection with the circulation of "deauthorization" cards in the plant to announced UMW supporters. Simon's testimony indicates, however, without effective contradiction, that he had described such action by Randall, if established, as contrary to company policy, that he had described himself as without personal knowledge of the matter, and that he had asked his subordinates to investigate and make a report as to whether Randall was, in fact, so engaged. In the absence of any dispute, I credit this testimony.

(Among other things, it is worthy of note in this connection that Mrs. Evans, according to her own testimony, told Simon, during the conversation now in issue, of the way in which the other employees were "treating" the UMW adherents. According to Mrs. Evans, Simon asked whether she had ever raised a question with respect to the problem before the IAM leadership; her reply, apparently, indicated the reluctance

of the incumbent union's leadership to entertain a grievance against itself. She testified that the production manager then told her that whenever anybody did "anything" to her she was to "come in" and file a grievance. The attitude of the production manager, thus revealed, has been one of the factors impelling me to conclude, as I have concluded, that his course of conduct in this situation did not stem from any bias against the "outside" organization or in favor of the incumbent union.)

On the 8th of February, also, Mrs. Hamilton, wearing a UMW button, was approached by General Foreman King while at her taping machine. Her testimony with respect to the conversation which ensued reads as follows:

He came to me and he says, "Ann," he says, "have you read or have you heard of the notice that Mr. Simon had posted on the bulletin board that there was to be no campaigning on company time or property?" And I says, "I'm not campaigning on company time or property." He said, "You are wearing a badge." I said, "Well, I'm still not campaigning." And he said, "Well, you'll have to take that badge off." And I said, "I didn't see why I'm not allowed to wear my badge if other people are." He said, "Well, we think you are campaigning and you have to take your badge off." And he left me.

General Foreman King, as a witness, insisted that he had never ordered any employee to remove a

UMW badge or button. His testimony shows, however, that Mrs. Hamilton's action in displaying the button had been brought to his attention by several IAM adherents, that these supporters of the incumbent union had complained of the "dissension" engendered by the UMW campaign, that he (King) had requested advice from Production Manager Simon with respect to the Respondent's policy in the situation—and that he had spoken to Mrs. Hamilton, nevertheless, without awaiting the production manager's answer. In general, the foreman impressed me as a reluctant witness—somewhat abashed, to say the least, at the sound of his own testimony. His demeanor as a whole, conveyed a very strong impression that relevant information, within his knowledge, was being deliberately withheld. Upon the entire record, and my observations, I find Mrs. Hamilton's version of the incident, quoted, more worthy of credit. It is so found.

On the morning of February 10th, however, pursuant to the renewed advice of a UMW representative, Mrs. Hamilton wore her button again. This time, shortly after work began, she was approached by Section Foreman Kresin. Her version of their conversation reads as follows:

He came up to me and he says, "Ann, I don't want you to start any fussing or fighting back in the plant about wearing your badge." I said, "Mell, I'm not going to say anything to anyone. If anything is said, they will say it to me." He says, "Well, you will have to take that badge

off." . . . And I left my badge on and he walked away.

Mrs. Hamilton's testimony also indicates that she pointed out that "the other people" were wearing their badges, and that Kresin made no comment.

The section foreman admitted an admonition to Mrs. Hamilton about campaigning on company time, but denied any order with respect to the removal of her UMW button. His further testimony, however, indicates that Redden and Dorothy Randall, adherents of the incumbent union, had complained to him about the UMW pins, earlier in the week. There is no evidence whatever, in the record, with respect to Mrs. Hamilton's activity in behalf of the UMW on company property, during working hours or otherwise. Insofar as the record will support any conclusion, I am convinced that the section foreman's warning with respect to "campaigning" on company time could only have been based upon a belief that the display of a UMW button constituted campaigning. In the light of the available evidence and my observations, then, I credit Mrs. Hamilton's version of the incident now under consideration.

(In doing so, however, I have placed no reliance upon the corroborative testimony given by Mrs. Evans, who described the Kresin-Hamilton conversation as one taking place before the day shift started—a contention not otherwise established by the record.)

Shortly after the morning "coffee break" on the 10th of February—during which Mrs. Hamilton left the plant under circumstances to be related elsewhere in this report—Production Manager Simon appears to have had a conversation with J. C. Hamilton, at his work station, with respect to union activity. The statements of each in regard to the gist of their talk, however, are sharply at variance. No useful purpose, in my opinion, would be served by a detailed analysis of their testimonial conflict. For the purpose of this report, I find it sufficient to note that Hamilton, in substance, accused the production manager of ordering him to take off his UMW badge. According to Hamilton, Simon also threatened him with discharge for engaging in UMW organizational activity, advised him that all of his incoming telephone calls would have to be routed through the Respondent's office thereafter, and threatened to close the San Diego plant and remove all harness work to the Respondent's Anaheim operation if the UMW campaign succeeded. The manager, in his final appearance as a witness, denied the issuance of any order requiring the removal of UMW badges; he also denied any threat to close the San Diego plant, and characterized such a threat, in fact, as impossible of execution, for reasons not material in this report. He admitted a conversation with J. C. Hamilton in which he had attempted to admonish the packer with respect to absences from his work station in connection with incoming calls, and in which he had insisted upon the Respondent's right to control the activities of employees during

working hours, despite a threat by Hamilton to initiate charges before this agency on the basis of the Respondent's alleged interference with protected concerted activity on the part of the San Diego workers.

Whatever the situation with respect to Kresin and King may have been, I am satisfied that Simon understood, generally, the permissible limits of employer action in a context of organizational rivalry. He had, of course, been "briefed" in this respect, some time earlier. I find it difficult, therefore, to believe that he would have engaged in baldly coercive threats of the type indicated in J. C. Hamilton's testimony. His own version of the conversation was given with every indication of sincerity, and abounded in circumstantial detail. Upon the entire record, then, I have rejected J. C. Hamilton's version of the incident.

The testimony of Mrs. Evans, finally, indicates that early in February, on a date not set forth specifically in the record, Production Manager Simon—in a lengthy conversation—indicated his preference for the incumbent union as the accredited representative of the employees, insisted upon the propriety of a UMW button ban because of the Respondent's obligations under its IAM contract and because such button displays would constitute campaigning on company time, indicated that he felt free to discharge Mrs. Evans for "insubordination" and to move the San Diego plant's work to Anaheim, and identified himself as the individual who had "dug"

in the IAM when informed of the desires of the San Diego employees with respect to union representation. This testimony, too, was vigorously challenged by the production manager. His version of it, in my opinion, requires no repetition. With specific reference to the only thing new in the remarks attributed to him, Simon denied that he had "drug" in the IAM to represent the Respondent's San Diego employees. And, in fact, the Respondent's contract with that organization—received in evidence without objection—embodies a recital with respect to its certification prior to Simon's San Diego assignment. Upon the entire record, then, I am satisfied that Evans misconstrued the plant manager's remarks, in this as in other respects, and that their over-all import suggests, rather, a determined effort on the part of the Respondent's local management to give effect to its current IAM contract and, at the same time, to maintain a policy of neutrality. It is so found.

The record is silent with respect to the UMW's organizational activity, if any, at the San Diego plant after the 10th of February, as noted. Some time previously, it would appear, charges had been filed against Mrs. Hamilton, Mrs. Evans, and several other adherents of the "outside" organization, as members of the incumbent union. These charges appear to have been heard before an appropriately constituted committee of the incumbent union some time subsequent to the 10th of February. None of the individuals charged appeared in their own defense. All of them, apparently, were expelled.

D. Mrs. Hamilton's Discharge

On February 10, 1954, Frances Miranda, the Respondent's "repair girl" was absent. And shortly after work began, I find, this fact was reported by Redden to the section foreman. Kresin immediately undertook to arrange for Miranda's temporary replacement.

(The Respondent's repair station, I find, is a work station at which defective harnesses "tagged" by the Respondent's inspectors are repaired. Wires with defective insulation, and defective or broken attachments, are replaced. Upon the completion of any necessary repairs the harnesses are sent, together with those which the inspectors have previously passed, to the packers. The record shows, and I find, that uninterrupted performance at the repair station is considered essential to the Respondent's productive activity, since an accumulation of unrepaired harnesses on the Respondent's overhead conveyor would, in short order, block the passage of the other completed work to the packers. The effective replacement of Miranda was therefore, I find, essential.)

Within an hour after work began, Kresin appears to have determined that Inez Hobbs, an employee regularly assigned to the large rotary conveyor—also designated as Debbie in the record—would have to be assigned to Miranda's repair station, and that Mrs. Hamilton, then assigned to a "taping" ma-

chine, would be the employee designated to replace Hobbs, temporarily, on the conveyor. Greenwood and Redden, I find, were so advised.

(The manner in which the section foreman reached his decision is not revealed, clearly, by the record. He may have conferred with both of the lead women involved, and he may, indeed, have sought their suggestions with respect to the replacement of the absent repair girl. I find it most logical, and consistent with sound industrial practice, to assume that he did. At least two of the employees on the large conveyor—including Hobbs, then assigned to a “wire” station—appear to have had sufficient experience to handle the repair assignment; Kresin could very well have sought Greenwood’s assistance in connection with the choice he had to make. Her testimony suggests that he did; at least, it is indicated that he told her he might have to use one of the conveyor girls at the repair station. And there is testimony by Redden, which I credit, that Kresin asked her to suggest a temporary replacement for Hobbs on the big conveyor and that Mrs. Hamilton was suggested by her. Eunice Ford, an incumbent union official, testified that she had previously suggested Mrs. Hamilton to the lead woman, with deliberate malice, as a replacement on the conveyor. Her testimony also suggests that Redden had acquiesced in the suggestion, after a reported conference with the Respondent’s production man-

ager. In the light of the entire situation revealed by the record, however, I have not considered this testimony worthy of credit. Even if accepted, it would not be sufficient, in my opinion, to sustain a conclusion that Mrs. Hamilton's actual selection for temporary reassignment to the large conveyor, by Section Foreman Kresin, was motivated by malice. No such conclusion is reached.)

Within a short time after Kresin's announcement, Greenwood apparently decided that the replacement to be supplied by Redden would not be assigned directly to the work station vacated by Hobbs. A double shift appears to have been arranged, under which Hobbs, when called, would leave for the repair assignment and Jo Hutchins, then assigned to the "take-off" station, would be assigned to replace Hobbs. Mrs. Hamilton, the transferee, then, would be assigned to replace Hutchins.

(The record is silent as to the circumstances under which Greenwood made these decisions, and the manner in which they were communicated to the employees involved. Greenwood testified, however, without qualification, that she had discussed the projected shift with Hutchins and Hobbs sometime prior to the arrival of Mrs. Hamilton in Redden's company. Upon the entire record, also, I am satisfied with respect to Greenwood's awareness, at the time, of the fact that Mrs. Hamilton was scheduled to be the re-

placement for Hobbs. I find that she was aware of the projected reassignment when she outlined the shifts to be effectuated to the girls under her direction.)

At 9:00 o'clock, approximately, Redden asked Mrs. Hamilton to accompany her to the large conveyor. The taping machine operator did so. Upon their arrival, Redden informed Greenwood, then relieving another employee at a work station on the conveyor approximately 25 feet away, that Mrs. Hamilton was ready for her temporary assignment. Greenwood, I find, waved her arm in acknowledgment; this action served as a signal to Hobbs, who immediately left her station on the conveyor, immediately adjacent to the "take-off" station, and went off to assume her temporary assignment as the Respondent's repair girl. Simultaneously, Jo Hutchins, then assigned to the "take-off" station, stepped into the station which Hobbs had vacated. Betty Cave, the relief girl assigned to serve as a general assistant to Greenwood on the conveyor, indicated to Mrs. Hamilton that she would have to work at the "take-off" station. She—Mrs. Hamilton—did so, and productive operations on the conveyor continued without interruption. The taping machine operator, I find, had no opportunity to discuss her assignment. And Greenwood's testimony establishes that she proffered no instructions as to the way in which the job was to be performed.

(These factual findings as to the method by which Mrs. Hamilton was given her assignment

on the Respondent's big conveyor are based upon a synthesis of the available testimony. Mrs. Hamilton testified that Redden left her with Cave, and that it was Cave—with Greenwood's acquiescence—who directed Hobbs to leave for the "repair" station, shifted Hutchins to the wire station thus vacated, and then assigned her (Mrs. Hamilton) to the "take-off" station. Upon the entire record, however, I have concluded that the taping machine operator's version of the shift attributes too active a role to Greenwood's relief girl.)

Within a few minutes after her assignment to the "take-off" station Mrs. Hamilton, I find, asked Betty Cave for a pair of canvas gloves to protect her hands. The relief girl indicated that they would be procured for her.

(The record indicates that a number of employees assigned to the rotary conveyor wore gloves at work, occasionally at least, to protect their hands. And Greenwood's testimony, indeed, indicates that the girls at the "take-off" station customarily did so. I so find. These gloves appear to have been unfitted canvas work gloves of a type issued routinely to the employees, upon request. There is no indication, in the available evidence, that the Respondent had any fixed rule with respect to the disposition of such gloves. Some of the employees retained them until they became worn and useless; others, apparently, left their gloves in the cen-

ter of the conveyor table, and reclaimed them as needed. The testimony of Mrs. Hamilton establishes, however, without contradiction, that there were no gloves available on the table or otherwise, at the time of her assignment to the "take-off" station. Hutchins appears to have retained the pair she had been using there.)

Cave's testimony establishes, credibly and without contradiction, that it was her usual practice, upon the receipt of any request for gloves, to communicate the request to Section Foreman Kresin—and that the latter would bring them to her, after they had been procured from a storeroom with the assistance of the Respondent's janitor, in charge of the storeroom keys. It is her testimony, also, that Mrs. Hamilton's request was communicated to Kresin almost immediately. And this testimony has been corroborated by the section foreman. In the absence of effective contradiction, I find it credible. Mrs. Hamilton, however, insisted that the gloves were not, in fact, handed to her within fifteen or twenty minutes of her request, as Cave's further testimony would indicate; she received them, she says, just before the Respondent's morning "coffee" break. Upon the entire record, and my observation of the witnesses, I credit her testimony in this connection.

In the meantime, for almost an hour, Mrs. Hamilton experienced considerable difficulty at her work station on the large rotary conveyor. Her testimony with respect to the treatment she received from her

fellow employees is not too detailed; a synthesis of the available evidence, however, indicates that:

(1) She found the various harness wires pushed down tightly on the jigs, and sometimes tied, so that greater effort than usual, on her part, was required in order to lift each completed harness from the conveyor.

(2) Several employees at stations directly opposite on the conveyor laughed at her, and giggled at their work, in a manner which indicated to Hamilton that the employees involved relished her discomfiture at the "take-off" station. Greenwood also laughed, when looking at her.

(3) The rough surfaces to be found on every completed harness scratched her hands—as she jerked the harnesses loose and lifted them from the conveyor—and ultimately drew blood.

After approximately one hour in her new assignment, Mrs. Hamilton revealed herself to be in obvious distress. She described herself as "nervous" and "upset" when the regular rest period began. And several other witnesses have testified, credibly, that she was in tears.

(The Respondent argues, vigorously, that Mrs. Hamilton's testimony as to her difficulties at the "take-off" station should be rejected as incredible, because of her admission, as a witness that she made no complaint of any kind,

prior to her departure from the plant—either to her lead woman or the section foreman—about the harassment and mistreatment to which she had, allegedly, been subjected. And in retrospect, certainly, it would seem that a complaint, to someone, might well have been more in accord with “ordinary human behavior” or “standard operating procedure” under circumstances of the sort she has attempted to describe. There can be no doubt, however, on the present record, of her emotional reaction to the treatment she received, allegedly, after the reassignment now in issue. And, viewing the entire incident in the context of her evident distress, I cannot agree that her failure to choose a more rational course by way of reaction militates, seriously, against the credibility of her testimony.)

Leaving her station, during the rest period, Mrs. Hamilton sought the Respondent’s nurse in the “coffee room” of the plant. In answer to an inquiry as to whether Mrs. Barnes, the Respondent’s personnel clerk, could be found, Mrs. Hamilton was informed by the nurse that she (Mrs. Barnes) was not in the plant that day. The taping machine operator, I find, then sought her section foreman. Their conversation, after she found him, proceeded, according to Mrs. Hamilton, as follows:

I went up to Mel and I says, “Mel, I’d like to speak to you, please.” And he says, “All right, what is it?” I said, “Mel, I’d like to go home.”

He said, "What's the matter, are you sick? If you are, go see the nurse." I said, "Mel, what's wrong with me the nurse cannot help." He said, "Well, I hate to see you go." And I said, "Well, I just got to." And I said, "Don't you have to have a slip, an order for me to leave the plant." And he said, "I will fill it out and hand it in for you." And that was all I had to say to him at that time.

According to Hamilton, she then punched out and left the plant. Kresin's version of the conversation differs only in one significant respect. It reads, in the transcript, as follows:

. . . I happened to be in the aisle right at the tables and she met me there and told me she wasn't feeling well and wanted to go home. I says, "Ann, I can give you a pass to go to the nurse. I cannot issue a [pass] to leave the factory if you are not feeling well. You have to go through the nurse." I told her I hated to see her leave but if she was feeling bad [—] by that time she turned around and walked away from me [—] I told her I would issue a pass for the nurse . . . she said, "What is ailing me the nurse cannot do anything for me." I said, "Well, I still have to give you a pass for the nurse." . . .

Kresin denied that he ever told Mrs. Hamilton that he would make out a pass for her, and that she was free to leave. As a witness, he insisted throughout his tenure on the stand that he had merely indicated his willingness to make out a pass for the tap-

ing machine operator to take to the nurse, and denied any commitment to prepare a pass which would authorize her to leave the plant.

(The record establishes, and I find, that the Respondent maintained a regular procedure, pursuant to posted rules and regulations, under which passes might be issued to employees wishing to leave the plant for personal business during their shift, or because of a sudden illness. In cases involving personal business during working hours section foremen appear to have been authorized to issue passes, in their own discretion, which the worker involved would have to deposit with Mrs. Barnes at the Respondent's personnel office en route to the gate. In cases involving sudden illness, the procedure appears to have called for the preparation of duplicate passes by the section foreman which the affected employee would be required to present at the office of the Respondent's first aid nurse; after treatment, if the nurse indicated her concurrence as to the employee's inability to work, an appropriate notation would have to be made on the second copy of the pass, and the employee involved would have to present it to his or her section foreman, prior to any departure.)

Upon the entire record, I find Kresin's version of the conversation now in issue more worthy of credit. Mrs. Hamilton, generally, did impress me as an honest witness, testifying to the best of her recollection.

It is clear, however, that she was distraught at the time of her conversation with the section foreman, whereas Kresin was not. And in view of the section foreman's obvious need to retain the services of every available employee—after his makeshift attempt to replace the firm's absent repair girl—I could not accept, easily, any contention that Mrs. Hamilton's departure would have been facilitated by him, under the circumstances revealed by the record. I find it to be more than probable, instead, that Kresin, in fact, did nothing more than indicate his willingness to make out a pass for presentation by Mrs. Hamilton to the Respondent's nurse, and that the taping machine operator, in her distress, misconstrued his statement as a promise, in substance, to relieve her of any need to comply with the firm's posted rule. In reliance upon this interpretation of Kresin's remarks, apparently, Mrs. Hamilton left the plant without securing any sort of document from him, for delivery to the nurse or the desk of the personnel clerk.

(In rejecting Mrs. Hamilton's version of the conversation now in issue, I have also rejected the corroborative testimony offered, to the same effect, by her husband. Although he may not have been emotionally involved, at the time, his version of the incident closely parallels that of Mrs. Hamilton; I am convinced that his recollection of it has been influenced and colored by hers.)

On the morning of the 1th, when she reported for work, Mrs. Hamilton found that her time card was not in its regular place. Upon inquiry of Mrs. Barnes as to the reason for its absence, she was advised to see her foreman. She did so. Her testimony with respect to the conversation that ensued reads as follows:

I went up to Mel and I asked Mel why I had to see him before I went to work and why my time card was pulled. And he says, "Well," he says, "You left the plant yesterday without permission." And I said, "Mel, you told me that you would fill out the slip and hand it in for me." And he said, "You ought to know you can't do anything like that." And I said, "How am I to know you can't do anything like that? You told me you would." And he said, "I don't know nothing else about it. You will have to see Mr. Harms."

The section foreman's testimony as to the conversation indicates merely that he referred Mrs. Hamilton to Plant Superintendent Harms for the answer to her question. The taping machine operator's version, however, as set forth above, contains more circumstantial detail, and the sentiments attributed to Kresin by her are consistent with the position which the Respondent ultimately took. I see no reason to doubt the accuracy of her recital, therefore, and accept it as a correct report of the section foreman's remarks.

Harms, according to Mrs. Hamilton, whose testimony in this connection has not been denied or contradicted, reiterated the Respondent's belief that she had "walked off the job" the day before. The taping machine operator's attempt to explain "what had happened" in the course of her rest period conversation with Kresin were met with a further reiteration, by the superintendent, of the Respondent's belief. Mrs. Hamilton then asked if she had been terminated—and Harms replied in the affirmative. She has performed no work for the Respondent since. On February 12, 1954, she visited the Board's Los Angeles office, to file the initial charge in the instant case.

E. The Discharge of Mrs. Evans

Mrs. Evans, I find, began work for the company on April 2, 1953; most, if not all, of her service appears to have been as a checker or inspector in the "finished assembly" department, under the administrative supervision of Section Foreman Kresin and the work jurisdiction of Alex Gordon—the latter being directly responsible, within the department, for the effective performance of the "inspection" function.

Her activity on behalf of the Mine Workers Union, before and after the year-end holidays, has already been noted. While that union's organizational activity was at its height, Mrs. Evans appears to have functioned aggressively as the "chairman" of its campaign. And, as such, she would necessarily

be well known to the other employees as a UMW adherent. Such, in fact, was the case.

(The record shows that Mrs. Evans, on several occasions, found "doohiekeys" made of scrap material on the overhead conveyor hooks passing her work station; these objects, otherwise indescribable, usually bore tags with comments of a derogatory character about the checker or the Mine Workers organization. Their origin has not been established; Mrs. Evans identified Dorothy Randall, the IAM's vice president, as the originator of two, only. It may be inferred, of course, that they were prepared by IAM supporters on the production line and that they were intended as a mild form of ridicule directed to Mrs. Evans as the UMW chairman. There is no evidence that the Respondent's management was actually aware of the "horseplay" involved, however.)

For the entire period of her employment, Mrs. Evans appears to have been considered an efficient and capable worker. Responsible representatives of the Respondent have, indeed, conceded that her record as a checker was beyond reproach. I so find. A synthesis of the available evidence, however, will also compel a conclusion that she was frequently involved in cross-complaints and controversy with fellow workers. Alex Gordon, the firm's chief inspector, testified credibly that bickering and arguments involving Mrs. Evans, and some of the other workers in her area, developed throughout her

period of employment. Several instances of friction, apparently, were brought to Gordon's personal attention—and, through him, to the attention of other supervisors.

(In his brief, Respondent's counsel described Mrs. Evans as truculent. There is a suggestion, however, in the testimony of Gordon and several others, that most of the controversies in her work area involved disputes over the equitable distribution of the work, and that Mrs. Evans—admittedly an efficient worker—was being subjected, perhaps unjustifiably, to complaints grounded in the unwarranted resentment of less capable employees. Gordon also suggested that she may have been unduly sensitive. For the purpose of our present inquiry, however, I find it unnecessary to fix the blame for any of these early disputes.)

On May 4, 1954, Mrs. Evans became involved in such a controversy with Lauretta Brown, another inspector. The available evidence is somewhat in conflict with respect to the origin and nature of their dispute; upon the entire record, however, it would appear to have involved a question on the part of Brown, again, as to whether Mrs. Evans was performing her equitable share of the inspection work. Dorothy Randall, an incumbent union official, was asked by Brown, I find, to apprise General Foreman King of the controversy. Each of the employees, thereafter, discussed the situation with the general foreman; their stories, apparently, were

contradictory. The general foreman, I find, advised them both that he would hear no more, and that he did not believe either version of the dispute offered for his consideration to be completely accurate. He insisted, finally, that Brown and Mrs. Evans would have to "get along" with each other, and that "any" further disagreement would lead to their discharge. The two employees were advised of his intention to have a written notice of this ultimatum placed in their personnel files. And when the discussion ended, I find, the general foreman did, in fact, write the promised note in regard to each employee. Dated as of May 4, 1954, each note read as follows:

On this date above employee was warned and told that any future disagreements would mean her dismissal.

The notes were signed by the general foreman and placed in the Respondent's personnel files, as indicated.

Later in the day, Evans testified, she went to King with an apology, but protested his "final warning" on the ground that she had not been at fault in the controversy. The general foreman, according to Mrs. Evans, then advised her that if "anything else" came up she would have to "come in" and advise him of it directly, since he did not wish her to "argue" about anything in the plant. King, as a witness, could not recall such a conversation; he did not, however, enter a denial. I find

therefore, in accordance with the testimony of Mrs. Evans, that she was thus advised.

On June 3, 1954, however, a new cause of difficulty developed. Mrs. Evans, as a witness, provided the only testimony with respect to its nature and origin.

(Her version of the situation is not inconsistent with the balance of the record, and certainly could not be characterized as inherently incredible; I have found it worthy of acceptance.)

In substance, the checker testified that Employee Brown, in a discussion not initiated on company time, accused Mrs. Evans and her brother, J. C. Hamilton, of certain derogatory comments with respect to her work. Mrs. Evans, according to her testimony, disclaimed responsibility for the remarks attributed to her, and subsequently discovered—by independent investigation—that Brown's accusation had, in fact, been based upon a misconstruction of certain remarks about her by another employee. On June 4, 1954, before work began, the checker attempted to explain the situation to Brown. The latter, however, I find, persisted in angry recrimination.

Shortly after the morning rest period, therefore, Mrs. Evans went to see the Respondent's general foreman. Saying that she was following his most recent instructions, Mrs. Evans reported Brown's anger with her over a fancied slight; insisted that

the incident giving rise to Brown's anger had been a subject of discussion during their "free" time; and that she—Evans—was not really involved in an argument with her fellow checker; and declared her desire to report the situation before a "twisted" story in regard to it became current. Overriding a protest by the checker, King summoned Brown to his office for her version. Brown's recital, however, differed sharply from that of Mrs. Evans, both with respect to the nature of the incident which had given birth, allegedly, to her anger, and with respect to the course of the discussion which had then ensued.

(Mrs. Evans testified, credibly, that she and Brown had each described the discussion between them as one which had not been carried on during working hours. The general foreman's recollection of the incident, however, appears, understandably, to be somewhat confused. He could not, as a witness, recall such a representation by either employee, but made no attempt to deny it. Upon the entire record, I am convinced that he was, in fact, so advised.)

After listening to each of the employees King cut the incident short, I find, with the announcement that both of them would be discharged. According to Mrs. Evans, the general foreman declared, in words or substance:

* * * "Loretta, I guess you know I have warned you. I told you the next time any dis-

pute between you two I was going to fire you both * * * This is it."

Section Foreman Kresin was called and advised of the general foreman's decision. Mrs. Evans, however, did not accept it; she and her brother, who now entered the discussion, continued to urge consideration of the fact that she had not, intentionally, done anything to arouse Brown's ire, and that all of her attempts to mollify Brown and disclaim responsibility for the remarks improperly attributed to her, had been confined to non-working time. King insisted, however, that his mind was made up, and that his decision would stand.

Mrs. Evans, I find, then attempted to carry her protest with respect to the alleged injustice of the general foreman's decision to the Respondent's production manager. Simon, however, cut short her request that he overrule King's decision; he advised the checker, in substance, to press her protest as a grievance, under the contractually established grievance procedure. Mrs. Evans accepted this advice; her grievance "case" was initiated, I find, with the assistance of Betty Cave, the incumbent union's committeewoman for the "finished assembly" department.

(The record reveals a testimonial conflict as to whether Cave had displayed hostility in this connection, and as to whether she had initiated the grievance for Mrs. Evans willingly. For reasons to be noted elsewhere in this report,

however, I have found it unnecessary to consider the conflict revealed by the record in this connection. Whatever her personal reaction to the situation may have been Cave did, I find, initiate a grievance in the checker's behalf.)

Brown, as the record shows, also filed a grievance. She and Mrs. Evans were each invited to state the basis upon which they chose to protest General Foreman King's decision to discharge them, and to name the witnesses they wished to present in support of their respective contentions. Mrs. Evans named several—Alex Gordon, the "chief inspector" being one.

Thereafter, on a date not set forth in the record, the grievances were heard. Under the contractually established procedure, each of the employees involved was afforded an opportunity to protest King's decision before a Grievance Committee consisting of four members—two plant employees designated to serve as the IAM representatives, and two spokesmen for the respondent company. Production Manager Simon, and Superintendent Harms, I find, served as the company representatives.

Considerable testimony was received, in this case, with respect to the procedure which the Grievance Committee followed. Each of the aggrieved employees, apparently, was heard separately. Committeewoman Cave, however, as their accredited representative, was permitted to be present. Thereafter,

the record shows, the committee heard only one of the employees named by Mrs. Evans as a witness in support of her grievance. King and Kresin were also asked to testify. No further witnesses were heard.

(The decision to conclude the testimony appears to have been a unanimous committee decision. The testimony of Mrs. Evans indicates, however—in the absence of effective contradiction or denial—that Cave, as her representative, made no attempt to persuade the Committee that the other employee witnesses desired by her ought to be heard. And I so find.)

In the end, the Grievance Committee—by a unanimous vote apparently—sustained the action of the Respondent's general foreman, insofar as Mrs. Evans was concerned. Brown's dismissal, also, was affirmed.

Mrs. Evans, however, made one more attempt to reclaim her position in the Respondent's employ. In a subsequent conference with Freeman Brown, an IAM business representative, she protested the Grievance Committee's refusal to hear all of her employee witnesses, allegedly in a position to give testimony before it with respect to the propriety of the general foreman's determination that she and Loretta Brown had been involved in a "disagreement" which warranted their discharge. Business Representative Brown was asked, I find, to carry her grievance to the next step or, at the very least, to argue for a reversal of King's decision by Pro-

duction Manager Simon on the basis of the Grievance Committee's alleged failure to accord a "fair" hearing to the aggrieved employees. The checker was advised, however, that the concurrence of the IAM representatives on the Grievance Committee with respect to the propriety of her discharge precluded further action by the organization in her behalf, as a matter of right, under the contractually established grievance procedure. The business representative did, I find, promise to make informal representations to the Respondent's local management in her behalf. The record does not reveal, however, whether any such representations were, in fact, made. If made, they were ineffective. Mrs. Evans has performed no services for the Respondent since her discharge.

Conclusions

A. Interference, Restraint and Coercion

Under established decisional doctrine, fully explicated in decisions of this agency too numerous to cite, it would seem to be entirely clear that the Respondent's posted announcement with respect to the participation of its employees in "union campaigning" during working hours, or on company time, involved nothing more than the permissible exercise of a management prerogative. The General Counsel, indeed, makes no contrary argument. It is, instead, his contention, as set forth in the Consolidated Complaint, that the management of the firm extended the "thrust" of its policy announcement

—described as a no-solicitation rule—unlawfully. I find merit in this contention.

Early in January, 1954, as previously noted, in this report, Foreman Clyde Casey demanded that an employee, James A. Juhl, submit to him certain executed membership applications or authorization cards secured by the employee on behalf of the UMW during non-working time. This demand, as the record shows, was implemented by a threat of discharge. Confronted therewith, Juhl felt compelled to return the cards to the employees responsible for their execution, and to report their return to his foreman. The Respondent has adduced no evidence that the cards in Juhl's possession had, in fact, been solicited or procured on "company" time. Even if such evidence could have been offered, however, a demand that the cards be surrendered to a supervisory employee would clearly be worthy of characterization as unwarranted. Casey's demand, and his subsequent insistence that the right of an employee to "campaign" for a new union representative, under all circumstances, would be contingent upon the expiration of the incumbent union's contract, a representation election, and notice to the Respondent's office, clearly represented an unlawful intrusion upon the statutorily guaranteed right of Respondent's employees to engage in concerted activity for their mutual aid and protection.

(The Respondent's Answer admits that Juhl was asked to surrender "certain cards" but alleges that he had been using the cards to secure

applications during working hours; it is further alleged that Casey's demand had been calculated to "enable" Juhl to devote himself to his work during working hours, and that the cards, if surrendered, would have been returned to Juhl by Casey after his shift ended. These averments in the Respondent's Answer, of course, cannot be treated as evidence.)

Shortly after Casey's attempt to intimidate Juhl, as I have found elsewhere in this report, the employee was again admonished—this time by the Respondent's production manager—about "campaigning" on company time. In the light of the available evidence, taken as a whole, I am satisfied that the conversation in which Simon thus admonished Juhl took place after the Respondent's "no-solicitation" policy was announced—or, at the very least, after the production manager had received his instructions with respect to the position which the firm might appropriately take. On the basis of Simon's actual course of conduct, thereafter, as revealed by the record, I am convinced that he was engaged in a genuine effort, to implement the Respondent's policy, as he understood it. In conformity with this conclusion, I have, elsewhere in this report, rejected Juhl's sweeping generalization that he was instructed to campaign "off the company property out of the company time" as grounded in error. The production manager, however, has not denied that Juhl was instructed to desist from union activity during official rest periods, on the ground

that such periods were “company” time; the Respondent’s Answer, indeed, admits that such instructions were given—and I have found, elsewhere, that Simon so construed the Respondent’s posted announcement. As a matter of law, however, such a construction must be characterized as erroneous. In making it, the production manager was guilty of an unwarranted extension of the Respondent’s undoubted right to prohibit union activity during working hours. *Republic Aviation Corp. v. N.L.R.B.*, 324 U. S. 793, 16 LRRM 620; *N.L.R.B. v. Monarch Machine Tool Company*, 210 F. 2d 183, 33 LRRM 2488, 2491-2492 (C. A. 6), and the cases therein cited; *Peyton Packing Company*, 49 NLRB 828, 843-844, quoted with approval in the *Republic Aviation* case, above. And in the absence of any retraction, then, there can be no doubt that the position taken by the Respondent’s principal representative, in this connection, interfered with, restrained and coerced its employees, in their exercise of the self-organizational rights guaranteed under the statute, as amended. I so find. And Juhl testified, specifically, that his own activities were curtailed in compliance with Simon’s instruction, as given.

(The General Counsel also argues, however, that the Respondent “unlawfully enforced” its posted policy when Simon warned Juhl, in the Middle of February, that certain remarks he had previously made to some of his fellow employees, outside the plant and on non-working time, involved campaigning on “company time

and property," in defiance of the Respondent's announcement. This contention I find to be without merit. Juhl's testimony merely indicates that he had told several employees that workers at the Respondent's Anaheim plant were being compensated at higher hourly rates than those prevailing in San Diego, and that Simon had accosted him, primarily, to challenge the accuracy of the statements he had made. Although Juhl's testimony would seem to indicate that he was also warned, for a second time, about "campaigning" on company time and property, it is admitted that the production manager did not specify the type of "campaigning" to which his admonition referred. The mechanic has indicated that he, personally, construed the plant manager's comment as a reference to "wearing buttons and stuff like that" and not as a specific reference to the dissemination of the Anaheim rumor. Since I am entirely satisfied, in any event, that Simon never intended to enforce a sweeping prohibition of organizational activity, irrespective of its timing, on company property, I find the available evidence insufficient to establish the contention that the production manager by virtue of his reference to the rumors about the Anaheim plant, intended to warn employees against the expression of arguments or opinion related to the "factional" dispute within their ranks on company property during non-working time.)

It is also contended, by the General Counsel, that the Respondent enforced its policy with respect to union activity on company time discriminatorily, in certain specific respects. I find merit in the contention.

Whatever degree of good faith may be attributed to Production Manager Simon in a difficult situation, it would seem to be clear, upon the record as a whole, that an equally well-intentioned application of the Respondent's policy cannot be attributed to Kenneth King or Section Foreman Kresin. Elsewhere in this report, it has already been found that King, on the 8th of February, directed Mrs. Hamilton to remove her UMW button, on the ground that its display involved union "campaigning" on company time. And Section Foreman Kresin, it has been found, imposed a similar requirement on the morning of February 10th. In each instance, it is clear, the supervisors were acting to mollify the IAM supporters in the plant, and to allay their expressions of discontent. The record establishes however, in the absence of any attempt at denial or contradiction, that some, if not all, of the IAM adherents were openly wearing buttons indicative of their "loyalty" to that organization. Any button display obviously constitutes an open declaration with respect to the sentiments of the wearer. It may certainly be inferred therefore—and I do infer—that the firm's responsible officials were aware of the buttons being worn by each organization's partisans in the "factional" dispute then current.

Simon conceded as much. Under such circumstances, the attempts of King and Kresin to enforce a requirement that UMW buttons would have to be removed were clearly discriminatory. They were, in short, reasonably calculated to, and did, interfere with, restrain and coerce the employees of the Respondent in their exercise of those self-organizational rights which the statute was enacted to guarantee. Graber Manufacturing Company, Inc., 111 NLRB No. 20, 35 LRRM 1435; Century Cement Manufacturing Company, 100 NLRB 1323, 1324, n. 5. And I so find.

(The General Counsel has, by appropriate motion, withdrawn any contention that Production Manager Simon engaged in a similar unfair practice when he directed an employee, Gerald W. Pipmeier, to remove his UMW button on a specified date. There is testimony by J. C. Hamilton, however, which attributes a similar statement to the production manager, insofar as he was concerned. Upon the entire record, and for the reasons previously noted, I have found this testimony unworthy of acceptance.)

The General Counsel also argues that the Respondent discriminatorily enforced its posted policy announcement by the "acquiescence" of Production Manager Simon in the circulation of petitions at the plant, on company time, by supporters of the incumbent union, and by his "acquiescence" in the circulation of certain cards or petitions, by an IAM

committeewoman, by means of which the employees were urged to retract their UMW designations, if any, previously executed. These allegations, however, in my opinion, have not been proved. The record does indicate a possibility that two petitions may have been circulated during the period with which we are concerned. One appears to have been a petition, signed initially by an incumbent union committeewoman, pursuant to which more than 50 of the Respondent's employees requested an opportunity to confer with the firm's production manager. There is no reliable evidence, however, that any management representative knew of its circulation and execution prior to the time of its presentation. And upon its presentation, by an employee delegation, the production manager, insofar as the record shows, took the position that its circulation had involved an error, and that the employees would have to seek advice, as to the courses of action open to them in the face of organizational activity by a rival union, from their own union representatives. The second petition to which the record refers has been described, without effective contradiction, as a "TV" petition, addressed to a local television station; however disruptive of production its circulation may have been, it would seem to be clear that the problems implicit therein cannot properly claim our attention.

(If, in fact, the circulation of such a petition did involve some activity, unspecified, in behalf of the incumbent union, the fact has not been proved.)

With respect to the allegation that the Respondent, through its production manager, acquiesced in the circulation of cards or petitions calculated to invite a "retraction" or revocation of previously executed UMW designations, the record is likewise meager. Two employees—Mrs. Evans and James A. Juhl—testified that the alleged activities of Goldie Riggins and Dorothy Randall in connection with the circulation of such cards or petitions had been called to Production Manager Simon's attention; it should, however, be noted that neither of the employees testified, in circumstantial detail, with respect to the actual time and manner of their circulation.

(Juhl's testimony with respect to one occasion when Goldie Riggins showed him a document and sought to discuss it, on company time, gives no indication that the Respondent's management was aware of the incident.)

Although the testimony of Juhl and Mr. Evans would seem to suggest that the Respondent's production manager paid little or no attention to the complaint that IAM activity in derogation of the Respondent's posted policy had been undertaken in the plant, there is no reliable evidence of an outright refusal on Simon's part to investigate the charges, and no proof that he did not do so. No UMW supporter actually solicited for a revocation of his union designation, on company time, has been offered as a witness, and the name of no such employee has ever been cited to the production man-

ager, insofar as the record shows. If, in fact, the Respondent's management knowingly permitted such activities in the plant, during working hours, by adherents of the incumbent union, the discriminatory enforcement of the company's announced policy against "union campaigning" on company time would have been patent. Upon the entire record, however, I am constrained to find that the specific discrimination alleged in this connection by the General Counsel has not been established by a preponderance of the reliable and probative evidence. None of my conclusions with respect to the discriminatory enforcement of the company's posted policy have, therefore, been grounded upon the alleged "acquiescence" of the Respondent's management with respect to activity otherwise interdicted.

Upon the record as a whole, then, I have found that the Respondent, by its officers, agents and employees, did enforce its posted policy with respect to "union campaigning" on company time unlawfully and discriminatorily. My conclusions, however, are merely based upon Foreman Casey's demand that James A. Juhl surrender his accumulation of executed UMW membership applications or authorization cards, the statements of Production Manager Simon to Juhl that union activity would be prohibited at the plant during established rest periods, and the insistence of General Foreman King and Section Foreman Kresin that Mrs. Hamilton would have to cease wearing her UMW button, in

the absence of any similar requirement imposed with respect to the wearing of IAM buttons or badges. By these acts and statements, attributable to its officials and supervisory personnel, the Respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed by the Act, as amended. I so find.

B. Mrs. Hamilton's Discharge

1. The Issues

With respect to Mrs. Hamilton, the General Counsel contends that a discriminatory transfer took place on February 10, 1954, when the employee, regularly utilized as a taping machine operator, was reassigned to other work of a more "difficult and disagreeable" character at the Respondent's large rotary conveyor because of her participation in concerted activity with other employees for the purposes of collective bargaining or other mutual aid and protection; that the Respondent, by virtue of the discriminatory work assignment, caused her to leave the plant on the indicated date; and that its management then relied upon her action in leaving the plant as a pretext for his discharge. The Respondent, by way of reply, alleges that Mrs. Hamilton's last transfer was a temporary measure to fill a vacancy, due to the absence of another employee. It is further alleged, in the Respondent's answer, that Mrs. Hamilton was not "caused" to leave the San Diego plant on the 10th of February by any course of conduct attributable to her em-

ployer, and that she left of her own accord, without the permission of any responsible management official. On this ground, the Respondent contends that Mrs. Hamilton was discharged for cause, the cause in question being the "abandonment" of her employment at the Respondent's plant.

With the issue thus joined, a number of questions must be answered before any decision can be reached. Among those suggested by a cursory review, the following may be noted: Was Mrs. Hamilton deliberately selected for the temporary reassignment, in order that she might be subjected to harassment in a new post? If selected without discriminatory intent, was she, nevertheless, subjected to such harassment after her reassignment, because of her antecedent activity as a UMW supporter? And, whatever the evidence may show, was she selected for reassignment or subjected to harassment thereafter, by individuals for whose conduct the Respondent may be held liable? These questions, it is clear, must be answered in the affirmative, at the threshold of inquiry, before it can be said that the General Counsel is entitled to prevail.

If they can be affirmatively answered, however, other questions arise. Was the difficulty encountered by Mrs. Hamilton at the large rotary conveyor sufficient to excuse her departure from the plant? Or, in other words, may the treatment she received at the "take-off" station appropriately be characterized, in fact and in law, as a constructive discharge? If so, did her failure to comply with

the Respondent's established rule in regard to the procurement of a pass before departure provide "just cause" for her termination, and deprive the General Counsel of any justification for a claim that her discharge was effectuated because of her participation in protected concerted activity? And, if it did not, may the Respondent be relieved of liability for her discharge, nevertheless, because Plant Manager Simon and Superintendent Harms, who ordered her termination, were unaware, when they did so, of the fact that her departure had been forced? Or, in the alternative, may their responsibility—and the Respondent's liability—be determined on the basis of the facts as found, on the assumption that they may appropriately be charged with constructive notice of the events which actually induced Mrs. Hamilton to leave? To a consideration of these questions, then, we must now turn.

2. Analysis

a. The Reassignment

The record establishes that Mrs. Hamilton, during her employment, had previously served extensively on the so-called "small conveyor" at which harness sub-assemblies are fashioned. In the course of such assignments, Mrs. Hamilton testified, she had been called upon to serve at every type of station—the "wire" stations, at which prepared wires are placed on the moving jigs; the "taper" stations, at which the wires on the jig are wrapped with

plastic tape; and the "take-off" station, at which the completed sub-assemblies are removed and placed on a hand truck for transfer to the "big" conveyor. And the record also shows that Mrs. Hamilton, for a period of several weeks in November and December, had worked, at her own request, at the firm's large rotary conveyor. Her services during this period had been limited, it is true, to work as a "taper"—and briefly, thereafter, to work at a "wire" station.

(She had never been assigned to the "take-off" station.)

Upon the entire record, however, it is clear that Mrs. Hamilton could not be described as an employee without experience, insofar as work on the conveyors is concerned.

The General Counsel, nevertheless, appears to contend that Mrs. Hamilton was selected discriminatorily—and with deliberate malice—for the assignment which ultimately led to her separation from employment. Insofar as the record shows, this contention appears to be based, in the main, on the testimony of Eunice Ford, previously noted. I have found that testimony unworthy of credit. Even if it could be accepted, however, it would be insufficient, in my opinion, to sustain the General Counsel's contention. At the most, it would only support a conclusion that Ford, as an official of the IAM local, maliciously suggested Mrs. Hamilton's reassignment to the large rotary conveyor, presumably

as a reprisal for her activities in behalf of the Mine Workers organization. Assuming, arguendo, that she did so, the evidence sufficient to warrant the conclusion, nevertheless, would stand in isolation. An inference would have to be drawn that Ford had been aware, at the time, of the fact that Hobbs had been scheduled to leave the conveyor. Her testimony, it is true, indicates such an awareness. But a further inference would have to be drawn, to the effect that Redden, after receiving Ford's suggestion, conveyed it to Kresin—the individual actually responsible for the taping machine operator's reassignment—and that he was aware of the motivations behind the suggestion, and shared them. Upon the entire record, I find the inferential link in the suggested chain of causal logic too weak to sustain the General Counsel's contention.

(J. C. Hamilton's testimony that Kresin had delegated the choice of a replacement for Hobbs to Redden is rejected as unworthy of credit.)

In the light of the available evidence, instead, I am satisfied that Kresin was apprised by Redden of the Respondent's immediate need for a replacement at the "repair" station, that Hobbs was selected as the replacement on the basis of his disinterested evaluation of her experience and ability, and that Mrs. Hamilton, in turn, was selected by the section foreman, after his consultation with Redden, for reassignment to the "big" conveyor, nondiscriminatorily, because of her previous experience there.

(J. C. Hamilton, as a witness, testified that Kresin had been asked—after Mrs. Hamilton left the plant, as noted—why “they” were still “picking” on his wife, and that Kresin had declared his unawareness of the fact that she was being harassed. According to Hamilton, Kresin was then told that “they” had selected Mrs. Hamilton for the conveyor assignment in preference to other qualified employees, and that it looked as if she was being selected discriminatorily; Kresin disclaimed partiality, however, according to the packer, and protested that he had had nothing to do with any of the harassment allegedly suffered by Hamilton’s wife. And Mrs. Hamilton, as a witness, testified that she had not seen Kresin “immediately around” during her ordeal. There is not the slightest evidence, therefore, that Kresin’s protestations of personal innocence were false.)

No similar conclusions would be warranted, however, with respect to Mrs. Hamilton’s assignment, at the conveyor, to the “take-off” station. The record establishes, beyond any doubt, that Hobbs, at the time of her designation as the “repair” replacement, had been at a “wire” station. And, in general, it would seem that work at such a station would have been particularly suitable for Mrs. Hamilton as a replacement employee. At least, she had worked at a “wire” station on the conveyor previously.

(Betty Cave, as a witness, did testify that the station vacated by Hobbs was a "bell" station, at which certain "bell" attachments were affixed to each harness; and she did testify, further, that the task performed there required considerable speed and dexterity which Mrs. Hamilton could not be expected to possess on the basis of her limited experience. I find it significant, however, that no considerations of this type were cited by the section foreman, the lead woman, or anyone else, in justification of the Respondent's failure to utilize Mrs. Hamilton as a direct replacement for Hobbs, at the indicated "wire" station. A bell, in the sense indicated by Cave, would be nothing more than a special type of metal connector attached to a harness wire; it would usually be no more than one inch long and approximately three-eighths of an inch in diameter. In the absence of corroboration, therefore, I have not considered Cave's testimony, in this regard, as sufficient to warrant a conclusion that Mrs. Hamilton was denied assignment as a direct replacement for Hobbs for reason of productive efficiency.)

Upon the entire record, then, I am convinced that Greenwood arranged the double employee shift, which ultimately left the "take-off" station vacant, as a deliberate maneuver, in order to make possible Mrs. Hamilton's assignment there. Why was this done? Greenwood's testimony, in this connection,

must be characterized as refreshingly frank. She identified herself, in substance, as an adherent of the incumbent union, and admitted her awareness of Mrs. Hamilton's activity in the UMW's behalf. Her testimony establishes that she and a number of the other employees had, at various times, discussed the "problem" created by the UMW campaign and the action which could be taken to "relieve" the situation. When questioned, in regard to this discussions, Greenwood testified as follows:

Q. Well, do you recall having said anything at all?

A. I didn't like the idea of them coming in.

Q. Do you recall * * * that you wanted to make them unwelcome? A. Yes.

Q. Do you recall whether you made any suggestions of what should be done to make them unwelcome?

A. To give them jobs that they didn't like to do.

Q. And did you say why you thought that they should be given jobs that they didn't like to do?

A. Because I understood that was the only way that they would leave the plant.

And, specifically, with reference to Mrs. Hamilton's assignment, Greenwood admitted that her designation of the taping machine operator for the "take-off" station had been effectuated with full knowledge of the fact that Mrs. Hamilton was, then,

a UMW supporter. The lead woman then testified, as follows:

Q. Did you consider the take-off job as a disagreeable job? A. No.

Q. Did you think that Ann would consider it a disagreeable job? A. Yes.

Q. Was that one of the reasons why you assigned the job to her? A. Yes.

I consider this testimony dispositive with respect to the issue of Greenwood's intent, in the situation now under consideration. There are references elsewhere in her testimony, it is true, to the fact that she considered Mrs. Hamilton an "experienced" employee, at least as well qualified to handle the "take-off" station as anyone else regularly assigned to the conveyor. And, in the abstract, this may very well have been true; absent an extended opportunity for observation, certainly, it would be difficult to challenge such a conclusion on the part of the Respondent's lead woman. In the light of the available evidence, however, no such challenge is necessary. It would seem to be entirely clear, on the basis of Greenwood's testimony, that a plan to assign the UMW supporters to disagreeable work, in order to "drive" them from the plant, had commended itself to her attention, and that the assignment of Mrs. Hamilton to the "take-off" station was, then, arranged pursuant to such a plan. And I so find.

(I find it worthy of note, in this connection, that Hutchins and Hobbs had, for some time,

been following the practice of rotating their stations at frequent daily intervals; this practice, apparently, had had Greenwood's approval. Despite the fact that their predecessor at the "take-off" station had held the assignment steadily, without rotation, the arrangements current between Hutchins and Hobbs certainly suggest that the "take-off" assignment, even under ordinary circumstances, would be burdensome. The production manager, indeed, described it as "not the most desirable spot" on the rotary conveyor.)

The assignment must, necessarily, be characterized as discriminatory, therefore, and its object designated as one statutorily proscribed.

b. The Respondent's Liability

May the Respondent be held liable, however, for Greenwood's course of conduct? The General Counsel would so argue, apparently, on the ground, at the outset, that Greenwood is a supervisor. I find the contention to be without merit. There was considerable testimony adduced, in this case, as to the extent of her authority. I find it unnecessary, however, to recapitulate that testimony in detail. Insofar as the supervisory concept may have been given some form and content by its statutory definition, in Section 2 (11) of the Act, as amended, it is clear that Greenwood's employment was related to that of a supervisor only to the extent that she possessed the authority to "transfer" employees as-

signed to the large rotary conveyor as between the several "work stations" at the conveyor table. The discretion exercised in this connection, however, was comparatively minor; in my opinion, it could not be characterized as anything more than routine. *Poultry Enterprises, Inc., v. N. L. R. B.*, 35 NRRM 2151 (C. A. 5); *N. L. R. B. v. Parma Water Lifter Company*, 211 F. 2d 258, 33 LRRM 2810, 2811-2812 (C. A. 9); *Precision Fabricators, Inc., v. N. L. R. B.*, 204 F. 2d 567, 32 LRRM 2268, 2269 (C. A. 2); *Gerber Plastic Co.*, 108 NLRB No. 73, 34 LRRM 1065, *Mother's Cake and Cookie Company*, 105 NLRB 75, 78-90. Greenwood, then, was not a supervisor.

Such a conclusion, however, will not dispose of the issue actually presented for our consideration. For the General Counsel has also contended that the Respondent may be held liable for Greenwood's activities nevertheless, since its employees have been given "just cause to believe" that her action in assigning Mrs. Hamilton to the "take-off" station was taken "for and on behalf of the management" of the firm. See *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 80; *Walter Kocher and Co.*, 104 NLRB 1090, footnote two; *Ibid.*, at 1096, footnote ten. I find merit in the contention, even in the face of the available evidence as to the limited nature of Greenwood's authority.

Although the record, in my opinion, would not support any classification of Greenwood as a su-

pervisor, she is clearly an "agent" of the Respondent, at least insofar as her employment is concerned.

(The relationship of an employer and employee, or a master and servant, is, of course, nothing more than a specialized type of agency. 2 C. J. S. 1029, "Agency" § 2(c). An employee, to put the matter shortly, would seem to be nothing more than a special agent "employed for a particular purpose, thing, or class of work" and authorized to exercise limited powers, under restrictions imposed by his or her employer. Ibid. at 1036, § 3(d). Even in the absence of evidence sufficient to warrant a conclusion that Greenwood is a supervisor, therefore, the Respondent may be liable for her conduct, within the scope of her employment, under the "ordinary law of agency" which the Board is bound to apply. *International Longshoremen's and Warehousemen's Union, C.I.O. (Sunset Line and Twine Company)*, 79 NLRB 1487, 1507-1509, and the authorities therein cited).

A principal (employer) is considered to be liable, under the general rules of agency, for all of the torts committed by his agent (employee) while the latter is acting within the scope of his authority. And this liability will be given effect, as a matter of law, irrespective of the fact that the agent, in so acting, may have been seeking to protect some interest of his own as well—and, under certain circumstances, even in the face of evidence sufficient

to indicate that the agent's activity may have been wanton or malicious. Nor will the operation of the principle be affected by the fact that the duty violated may be one arising from a statutory provision. 3 C. J. S. 186-187, 192-193, "Agency" §§ 255, 258, 259. A determination as to whether any agent's tort was committed within the scope of his employment must necessarily be based, then, upon an inquiry as to whether the act involving the alleged tort was done in the course of the agency, and by virtue of the agent's authority, with a view to the principal's business. To state the matter otherwise, an agent's tort will be construed as action within the course of his employment when the agent, in performing it, was endeavoring to promote his principal's business, within the scope of the actual or apparent authority conferred upon him for that purpose. *Ibid.*, at 187, § 255. Compared 56 C. J. S. 272-275, 294, 320, "Master and Servant," §§ 561-563, 570, 572. These aspects of the "ordinary law of agency" are dispositive here. Whether or not Greenwood is a supervisor it is clear that her authority as a key employee includes the authority to effectuate transfers at the large rotary conveyor. Such transfers may be more or less routine. The discretion involved therein may be relatively minor. But, in practice, it is, I find, unreviewed. And the transfers, when made, are certainly made with a "view" to the business of Greenwood's principal, the Respondent in this case. They involve action taken "under the direction or control" of the Respondent's management. The lead woman's decision, therefore, to

create a vacancy at the large rotary conveyor for Mrs. Hamilton by the reassignment of Hutchins to the station vacated by Hobbs, was clearly a decision within the scope of her employment. She so testified. And if it was, in fact, discriminatorily motivated—as I have found—the Respondent cannot escape liability for it. I so find.

Again, the fact that Mrs. Hamilton was subjected to harassment at the “take-off” station could not have escaped Greenwood’s notice. Her responsibilities as a lead woman require her to maintain constant awareness with respect to the flow of work on the conveyor, the availability of the wire and the other necessary materials, the needs of employees with respect to relief—and, inescapably, the manner in which the work was being done. For this reason, and particularly in view of her express motivation for the assignment of Mrs. Hamilton to the “take-off” station, I find, despite her denials, that Greenwood was aware, at all material times, of Mrs. Hamilton’s situation. Yet the record does not reveal any effort, on her part, to eliminate or alleviate the taping machine operator’s difficulties. Such an “acquiescence” in the situation by the leadwoman, under all the circumstances, must likewise be imputed to her principal. *Ibid.*, at 189 § 255. And I so find.

c. The Constructive Discharge

Were the difficulties encountered by Mrs. Hamilton, at the large rotary conveyor, sufficient to ex-

cuse her departure from the plant? Opinions may differ. Viewed dispassionately, in retrospect, the “hazing” which she suffered might be characterized as relatively innocuous. It was purposive, however, and it did accomplish its purpose. It was sufficient, in short, to unnerve her and to cause her departure—that much is clear, beyond dispute.

(In reaching this conclusion, I have not relied upon the extensive testimony received with respect to the weight of the harnesses Mrs. Hamilton had to lift at the big conveyor, and the physical demands implicit in her assignment. In view of her lack of previous experience at the “take-off” station, on the conveyor in question, the strangeness of the assignment might well have been expected to contribute, somewhat, to her difficulties. The record, however, in my opinion, will not support any factual finding that the work, as such, involved any undue strain.)

The fact that an employee of greater resourcefulness and emotional stability might have withstood the treatment Mrs. Hamilton received, then, must be set aside as immaterial. In fact, and in law, she was constructively discharged. *Indianapolis Wire-Bound Box Company*, 89 NLRB 617, 622-623; cf. *Pacific Powder Company*, 84 NLRB 280, 281 and the cases therein cited. It is so found.

d. The Plant Rule

It has been found elsewhere in this report that Mrs. Hamilton, despite her emotional disturbance, questioned the section foreman, prior to her departure, with respect to the procurement of a pass to leave the plant. The inquiry, of course, established, beyond any doubt, her awareness of the plant rule or practice in this respect, previously noted.

(Mrs. Hamilton, the record shows, had previously been authorized, on several occasions, to leave the plant during regular shift hours because of illness, on passes countersigned by the Respondent's nurse, and for "business" reasons. As a witness, she admitted her knowledge of the procedure involved, and the pass requirement.)

The available evidence, previously noted, indicates that Section Foreman Kresin suggested the possibility of a pass for her to see the nurse, and that she rejected the suggestion as inappropriate since the nurse would be unable to "cure" her. Mrs. Hamilton has insisted that the section foreman then volunteered to prepare an appropriate pass for submission to the plant's personnel office, directly, after her departure. Her testimony, at least insofar as it imports a promise on Kresin's part to validate her departure, retrospectively, by the subsequent preparation of a pass, has been rejected. I am satisfied upon the entire record that the section foreman, instead, declared his reluctance to see Mrs.

Hamilton go because of the Respondent's need for her in the department that day, and that his offer of assistance, in connection with her departure, encompassed nothing more than a promise to prepare a pass for her to take to the nurse. This offer, it is clear, was rejected; Mrs. Hamilton left the plant, then, without any pass at all. In so doing, I find, she acted without regard to the apparent requirements of a reasonable and well-known plant rule.

Did her action, then, provide the Respondent with just cause for her termination irrespective of its antecedent causes, and vitiate the effectiveness of any claim that her discharge was effectuated because of her participation in protected concerted activity?

This question, in my opinion, must be answered in the negative. Mrs. Hamilton's constructive discharge involved discrimination with respect to the tenure of her employment, and the terms and conditions of her employment, reasonably calculated to discourage her activity in behalf of a labor organization. As such, it constituted an unfair labor practice, attributable to the Respondent, as I have found, under the established rules of agency. In the absence of any applicable plant rule designed to control unauthorized employee departures from assigned work stations, the firm's liability would be clear. In a context of unfair labor practices, should its presence as a factor in the case dictate a different result? I think not.

This case raises no question as to the right of economic strikers to withdraw their services without regard to the requirements of a valid and reasonable plant rule; nor do we have here a case involving any conflict between the application and enforcement of such a rule and the right of employees to engage in other forms of protected concerted activity.

The only question before us, indeed, on the present record, may be stated concisely as follows: May an employer responsible for a constructive discharge escape any obligation to redress the unfair labor practice involved because the employee subjected to discrimination failed to comply with the requirements of a plant rule in connection with a forced departure? Equity, with its "clean hands" doctrine would seem to compel the rejection of any such contention. He who would claim that the normal legal rights of another are impaired may not himself be guilty, wilfully, of illegal or improper conduct calculated to induce the very situation relied upon to warrant the impairment. Cf. *Mastro Plastics Corp.*, 103 NLRB 511, 513-515, 556-560. And since the Respondent, in this case, must be held liable for Mrs. Hamilton's constructive discharge, itself an unfair labor practice which goes to the very "heart" of the rights guaranteed by the statute, the effective administration of the national labor policy requires that it not be allowed to plead a forfeiture of Mrs. Hamilton's normal right to statutory protection because of an alleged

plant rule violation inseparably related to the very conduct for which it is responsible. I find no merit, therefore, in the Respondent's contention that Mrs. Hamilton's discharge was justifiable because of her failure to comply with the Respondent's established rule in regard to the procurement of passes prior to departure from the plant within shift hours.

The available evidence does establish, it is true, that Production Manager Simon and Superintendent Harms arranged for the taping machine operator's timecard to be "pulled" on the basis of Kresin's report that she had left the plant without a pass. And there is not the slightest indication in the record that the Respondent's managerial representatives—Simon and Harms—were actually aware, at the time, of the fact that Mrs. Hamilton's departure had been motivated, in any way, by the mistreatment to which she had been subjected.

(The production manager's undenied testimony establishes that Kresin was asked whether Mrs. Hamilton had given any reason for her expressed intention to leave, and that he had reported her as giving none despite a request on his part for some indication as to the basis for her evident distress. Kresin's testimony, as a witness in this case, however, is barren of any indication that he sought such a statement. The production manager, then, may actually have been acting on the basis of a misconception as to the existence or non-existence of a motivation for Mrs. Hamilton's departure.)

I find the absence of such knowledge, however, immaterial. The principle of respondeat superior, otherwise applicable here, cannot be characterized as inapposite merely because of the General Counsel's failure to establish that the management representatives immediately responsible for the discharge decision acted with direct and personal knowledge of the circumstances herein found sufficient to render their action an unfair labor practice. Cf. *Safeway Stores, Inc.*, 110 NLRB No. 242, 35 LRRM 1371; and see Section 2 (13) of the statute. I so find.

The record shows that Mrs. Hamilton made no effort to protest her discharge under the incumbent union's contractual grievance procedure. The Respondent has not relied upon her failure to utilize that procedure, however, in connection with its formal disclaimer of liability under the statute. And indeed, under established decisional doctrine, any such reliance on its part would clearly have been misplaced; the failure of a dischargee to file or prosecute a grievance has been held no bar to an otherwise meritorious unfair labor practice charge. *N. L. R. B. v. Radio Officers Union*, 196 F. 2d 960, 30 LRRM 2102, 2106 (1952), affirmed 347 U. S. 17; *Columbus Iron Works Co.*, 107 NLRB No. 283, 33 LRRM 1371, 1372, and the cases therein cited. See also Case No. 869, Administrative Rulings of the NLRB General Counsel, 33 LRRM 1138, for a discussion of the principles involved. This agency's power to prevent unfair labor practices is not de-

pendent upon the unavailability of any other means of adjustment or prevention.

E. The Discharge of Mrs. Evans

The discharge of Loraine L. Evans is described categorically in the Consolidated Complaint as a discharge because of her participation in concerted activity with other employees for the purposes of collective bargaining and other mutual aid and protection. This contention, with respect to her discharge, the Respondent merely traverses. Its answer contains no further reference to the incident. Under the circumstances, then, we must turn to the record for some elaboration of the issues involved.

At the outset, it would seem to be the General Counsel's contention that General Foreman King's decision to discharge Mrs. Evans and Loretta Brown on the 4th of June was discriminatory, as to the former, because of his failure to accept a contention that Mrs. Evans was actually blameless in connection with the incident relied upon to justify her discharge. And on the basis of her admitted participation in the UMW organizational activity and the Respondent's awareness of such participation, the General Counsel would seem to argue that the selection of Mrs. Evans for discharge was reasonably calculated to discourage membership in that organization. I find the argument unpersuasive.

The record reveals, beyond all dispute, that employee relationships in the inspection area of the Respondent's "finished assembly" department were

characterized by occasional controversies and cross-complaints while Mrs. Evans was employed there. Several of these controversies had, in fact, been brought to the management's attention before the UMW activity began. Mrs. Evans appears to have been regarded as a valued employee—and there is an implication, certainly, in the available evidence that these early controversies may have been attributable to failures of adjustment on the part of her fellow employees. Upon a complete review of each incident cited, indeed, such a conclusion might well be warranted. Its significance in the present context, however, would be peripheral at best. Basically, there is presented here a situation in which a supervisor, harassed with argument and conflict in a controversy between two employees, has advised both of them that no effort will be made to determine the justice of their respective claims, and that any further disagreement between them would lead to their discharge. Thereafter, a "disagreement" does eventuate and, pursuant to the notice previously given, each of the employees involved is dismissed. On the basis of the available evidence it may very well have been true—as the General Counsel seems to argue—that Mrs. Evans was blameless in the matter. She may not have given Loretta Brown any genuine cause for anger, and her involvement in the "disagreement" thereafter may have been limited to protestations of innocence. It may very well have been true, also, that none of the discussions incidental to the "disagreement" took place on company time. Upon the entire rec-

ord, however, I cannot find that the general foreman's failure to consider these aspects of the situation, and to hold Mrs. Evans blameless, stemmed from his opposition to the UMW's organizational campaign. Essentially, he seems to have been motivated by nothing more than a desire to eliminate a personnel problem, by the discharge of each employee involved in the controversy. This may have been an "easy way" to eliminate any need for hard judgment, and it may have been poor personnel practice; on the present record, however, I cannot find that it involved discrimination with respect to the employment of Mrs. Evans to discourage membership in a labor organization. *N. L. R. B. v. Clearwater Finishing Company*, 216 F. 2d 608, 35 LRRM 2069 (C. A. 4).

Although the contention is not presented, explicitly, in the Consolidated Complaint, the General Counsel would, apparently, also argue that Mrs. Evans suffered discrimination at the hands of the Respondent in the course of the Grievance Committee hearing held with respect to her discharge.

(It may have been the General Counsel's intention to argue that the Respondent's reaffirmation of its discharge action, in the course of the grievance proceeding, constituted an independent instance of discrimination statutorily proscribed. Alternatively, it may have been his intention, however, to contend that the absence of any protest by the Respondent in the face of the incumbent union's alleged failure to rep-

resent Mrs. Evans properly should be construed as evidence that her discharge by the Respondent had been discriminatorily motivated. The analysis which follows is intended, in either event, to dispose of the issue.)

Essentially, it seems to be the General Counsel's view that Committeewoman Cave, of the incumbent union, represented Mrs. Evans before the Grievance Committee with poor grace; that she failed to represent the dischargee adequately when she refused to insist upon her right, as an aggrieved employee, to have all of her proffered witnesses heard; and that Business Representative Brown, of the incumbent union, revealed that organization's indifference to the proper presentation of her grievance by his failure to keep a promise to be present. These evidentiary indications are, of course, attributable to the incumbent union; if that organization may be considered obligated, as the certified bargaining representative of the employees, to represent Mrs. Evans as honestly and effectively as it could, it may very well have been guilty of a failure to meet the obligation. The General Counsel would apparently contend, however, that the Respondent, too, had a duty to protest such misfeasance on the part of the incumbent union's representatives—or, at the very least, a duty to reject any benefits it may have derived therefrom. I find no indication in the statute, or decisional doctrine, of any such duty. The Respondent's representatives on the Grievance Committee may, conceivably, have been

aware of the incumbent union's alleged failure to present a case for Mrs. Evans in the most effective way. I find no justification, however, in that fact—if it is a fact—for a conclusion that the Respondent was thereby obligated to protest the incumbent union's failure, in substance, to challenge its discharge action effectively.

(Mrs. Evans, certainly, made no effort to invoke such a protest; nothing in the record indicates that she objected to the Grievance Committee's procedure, or to her representation by the IAM, at the time.)

Surely it would be anomalous for an employer to sit on "both sides of the table" in a grievance matter; how can it be argued that employers are obligated to make sure that any challenges addressed to their own antecedent action are presented vigorously and in the strongest possible way? The answer to this question would seem to be more than clear.

Since the Respondent, then, was under no duty in the premises, its failure to act cannot be characterized as a statutory violation. Nor can it, in my opinion, be considered indicative of a corporate state of mind antithetical to the assertion or defense of statutorily guaranteed rights. Any contention to the contrary must be, and it is, rejected.

IV.

The Effect of the Unfair Labor
Practices Upon Commerce

The activities of the Respondent set forth in Section III above, which occurred in connection with its operations as described in Section I above, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V.

The Remedy

Since it has been found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the statute.

Specifically, since it has been found that the Respondent interfered with, restrained and coerced its employees, in the course of an attempt to enforce a prohibition, otherwise valid, on "union campaigning" during working hours, it will be recommended that it cease and desist from such conduct, and that it post notices declarative of its intention to do so.

It has also been found that the Respondent discriminatorily discharged Elizabeth Ann Hamilton on February 10, 1954, and that it has since failed

and refused to re-employ her because of her participation in concerted activity with other employees for the purposes of collective bargaining and other mutual aid or protection. It will, therefore, be recommended that the Respondent offer Mrs. Hamilton immediate and full reinstatement to her former or a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed. See *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827, 828-829, for a definition of the phrase "former or substantially equivalent position" as here used. It will also be recommended that the Respondent make her whole for any loss of pay or other incidents of the employment relationship which she may have suffered by reason of the discrimination practiced against her, by the payment to her of a sum of money equal to the amount which she normally would have earned as wages between the date of her discharge and the date of the reinstatement offer herein recommended, less her net earnings, if any, during that period. Cf. *Crossett Lumber Co.*, 8 NLRB 440, 497-498; *Republic Steep Corp. v. N. L. R. B.*, 311 U. S. 7 ff. Mrs. Hamilton's losses should be computed, I find, on a quarterly basis, in the manner established recently by the Board. See *F. W. Woolworth Co.*, 90 NLRB 289, 291-294; *N. L. R. B. v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U. S. 344 ff. In order to assure expeditious compliance with these recommendations in regard to back pay and reinstatement, I shall recommend, finally, that the Re-

spondent, upon request, make available, to the Board, and its agents, all pertinent records.

Since it would appear, however, that the Respondent, in the commission of the unfair labor practices found, has not been motivated by an all-pervasive antipathy to the United Mine Workers of America, District 50, as a labor organization, or to its employee supporters—except as the conduct herein found subject to proscription may have been dictated by the views of its responsible officials with respect to the scope of their managerial prerogatives—I do not infer the existence of a possibility that the Respondent, when apprised of the national labor policy, will nevertheless continue to engage in these unfair labor practices or others statutorily interdicted. I shall, therefore, refrain from any recommendation that the Respondent be required to cease and desist from such other unfair labor practices, or that it be required to post a notice to that effect.

Conclusions of Law

In the light of the foregoing findings of fact, and upon the entire record in the case, I have reached the following conclusions of law:

1. The United Mine Workers of America, District 50, unaffiliated, is a labor organization within the meaning of Section 2 (5) of the Act, as amended, which admits employees of the Respondent to membership.

2. By its demand for the surrender of certain union membership applications or authorization

cards executed on behalf of the United Mine Workers of America, District 50, unaffiliated, its insistence that a posted policy with respect to the prohibition of union organizational activity on company time would be applied to establish rest periods, and the attempts of its supervisory personnel to require the removal of United Mine Worker buttons worn during working hours, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights statutorily guaranteed, thus engaging and continuing to engage in unfair labor practices within the meaning of Section 8 (a) (1) of the Act, as amended.

3. By its constructive discharge of Elizabeth Ann Hamilton on February 10, 1954, and her subsequent formal separation, to discourage membership in a labor organization, the Respondent engaged and has continued to engage in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act, as amended.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act, as amended.

5. The Respondent has not, by its discharge of Loraine L. Evans on June 4, 1954, and its subsequent failure or refusal to re-employ her, discriminated against her because of her participation in concerted activity with other employees for the purposes of collective bargaining or other mutual

aid and protection, or to discourage membership in a labor organization. The Respondent thus has not, by its course of conduct in this respect, engaged in any unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act, as amended.

Recommendations

Upon these findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the Respondent, Essex Wire Corporation, d/b/a Essex Wire Corporation of California, at San Diego, and its officers, agents, successors, and assigns, should:

1. Cease and Desist From:

(a) Discrimination with respect to the hire and employment tenure of its employees or their terms and conditions of employment, by discharge or otherwise, to discourage membership in any labor organization of its employees;

(b) Imposition of any restraint upon employee activities, of the type found herein, calculated to interfere with, restrain, or coerce its employees in their exercise of the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own free choice, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such rights may be affected by an agreement requiring

membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Offer Elizabeth Ann Hamilton immediate and full reinstatement to her former or a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed, in the manner set forth in the "Remedy" section of this report;

(b) Make whole Elizabeth Ann Hamilton for any loss of pay or other incidents of the employment relationship which she may have suffered because of the discrimination herein found, by the payment to her of a sum of money equivalent to that which she normally would have earned as wages between the date on which discrimination was practiced against her and the date on which the Respondent offers reinstatement to her, in the manner set forth in the "Remedy" section of this report, less her net earnings, if any, during the period in question;

(c) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for a determination of the amount of back pay due and the kind of reinstatement appropriate under the terms of this recommendation;

(d) Post at its plant in San Diego, California, copies of the notice attached to this report as an appendix. Copies of the notice, to be furnished by the Regional Director for the Twenty-first Region as the agent of the Board, should be posted by the Respondent immediately upon their receipt after being duly signed by a representative of the firm. When posted, they should remain posted for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable care should be taken by the Respondent to insure that these notices are not altered, defaced, or covered by any other material;

(e) File with the Regional Director of the Twenty-first Region, as the agent of the Board, within twenty (20) days of the date of receipt of this Intermediate Report and Recommended Order, a statement in writing as to the steps which the Respondent has taken to comply with the recommendations it contains.

Recommended Order

If within twenty (20) days of the date of service of this Intermediate Report and Recommended Order, the Respondent satisfies the Regional Director, as the agent of the Board, that it has complied or will comply with the foregoing recommendations, it is recommended that the National Labor Relations Board issue an order or take other appropriate action to close the case on compliance.

If the Respondent has not satisfied the Regional Director within twenty (20) days of the receipt of the Intermediate Report and Recommended Order that it has complied or will comply with the foregoing recommendations, it is recommended that the National Labor Relations Board issue an order requiring the Respondent to take such action.

Dated this 15th day of February, 1955.

/s/ MAURICE M. MILLER,
Trial Examiner.

Appendix

Notice to All Employees

Pursuant to

The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in any labor organization on the part of any of our employees by discharging or refusing to reinstate any of our employees, or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of their employment.

We Will Not impose restrictions upon the right of our employees to engage in union or organizational activity during established rest periods or other non-working time, or their right to display union insignia personally while at work; nor will we, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to bargain collectively through representatives of their free choice, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that these rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

We Will offer Elizabeth Ann Hamilton immediate and full reinstatement to her former or a substantially equivalent position without prejudice to her seniority or other rights and privileges previously enjoyed, and we will make her whole for any loss of pay or other incidents of the employment relationship which she may have suffered as a result of the discrimination practiced against her.

All of our employees are free to become or remain members of any labor organization, except to the extent that this right may be affected by an

agreement in conformity with Section 8 (a) (3) of the Act, as amended. We will not discriminate against any employee in regard to hire or tenure of employment, or any term or condition of employment, because of membership in or activity on behalf of any such labor organization.

ESSEX WIRE CORPORATION
OF CALIFORNIA,
(Employer).

Dated:

By,
(Representative.) (Title.)

This notice must remain posted for 60 days subsequent to its date, and must not be altered, defaced, or covered by any other material.

[Title of Cause.]

EXCEPTIONS TO THE INTERMEDIATE
REPORT OF TRIAL EXAMINER

References to page numbers and lines hereafter contained shall, when referring to the Trial Examiner's "Intermediate Report," be designated as (I. R. page, line), and when referring to the "Official Report" of the proceedings before the Trial Examiner, be designated as (O. R. page, line).

(1) Respondent, Essex Wire Corporation, a Michigan corporation, doing business as Essex Wire

Corporation of California, herein referred to as "Respondent," takes exception to the Trial Examiner's finding that the United Mine Workers of America, District 50, unaffiliated, was a labor organization within the meaning of the Act. (I. R. page 3, line 8.)

(2) Respondent takes exception to the Trial Examiner's finding and conclusion as announced that Respondent was guilty of unfair labor practices, as described. (I. R. page 23, lines 42-56.) (I. R. page 26, lines 5-19.)

(3) Respondent takes exception to the Trial Examiner's finding that Helen Greenwood arranged the so-called "double shift" as described by the Trial Examiner (I. R. page 28, line 53 through page 30, line 7).

(4) Respondent takes exception to the Trial Examiner's finding that Respondent would be chargeable with the conduct, purpose, or intent of Helen Greenwood, or that she was an agent of Respondent. (I. R. page 30, line 10.) (I. R. page 31, line 45.)

(5) Respondent takes exception to the Trial Examiner's finding that Ann Hamilton was justified in departing from her job, under the circumstances, without any or further notice to Respondent. (I. R. page 31, line 50 through page 32, line 13.)

(6) Respondent takes exception to the Trial Examiner's finding that, under the circumstances of this case, Mrs. Hamilton was justified in departing from the plant in violation of what the Trial Ex-

aminer has designated as "The Plant Rule." (I. R. page 32, line 15 through page 34.)

(7) Respondent takes exception to the Trial Examiner's finding that Respondent discriminatorily discharged Elizabeth Ann Hamilton, or that any responsible official, employee, or agent of Respondent had anything whatsoever to do with Mrs. Hamilton's departure from Respondent's plant on February 10, 1954, and to the so-called remedy of the Trial Examiner. (I. R. page 36, line 15 through page 37, line 5.)

(8) Respondent also takes exception to the Trial Examiner's conclusions of law 1 through 4, inclusive, individually and in their entirety. (I. R. page 37, lines 9-36.)

(9) Respondent takes exception to the Trial Examiner's recommendations, individually and in their entirety (I. R. page 37, line 49 through page 38, line 50), or to his recommended order. (I. R. page 38, line 50 through page 39, line 5.)

(10) Respondent excepts to the admission over Respondent's objection of any kind all evidence of Helen Greenwood's private intent, conduct of purpose uncommunicated to Respondent, and to any and all findings based thereon. (I. R. page 29, lines 1-40.) (O. R. pages 188, 191.)

(11) Respondent, A. M. I., is convinced that an oral presentation of its position will have substantial effect upon the Board's decision, and, therefore, hereby requests permission to appear orally before the Board to argue its case.

Respondent's Brief in support of the foregoing Exceptions is attached hereto.

Dated: March 21, 1955.

HOLT, MACOMBER &
GRAHAM, and
FRANKLIN B. ORFIELD,
By /s/ WILLIAM H. MACOMBER,
Counsel for Respondent.

United States of America
Before the National Labor Relations Board
Case No. 21-CA-1921

ESSEX WIRE CORPORATION, a Michigan Corporation, d/b/a ESSEX WIRE CORPORATION OF CALIFORNIA,

and

ANN HAMILTON, an Individual.

Case No. 21-CA-2035

ESSEX WIRE CORPORATION, a Michigan Corporation, d/b/a ESSEX WIRE CORPORATION OF CALIFORNIA,

and

LORAIN L. EVANS, an Individual.

DECISION AND ORDER

On February 15, 1955, Trial Examiner Maurice M. Miller issued his Intermediate Report in the above-entitled consolidated proceeding, finding that

the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and briefs in support thereof.¹

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent that they are consistent herewith.

1. The Trial Examiner found, and we agree, that the Respondent violated Section 8 (a) (1) of the Act by demanding that an employee surrender the executed union membership cards he had in his possession, by prohibiting rival union activity during employee rest periods, and by requiring the removal of buttons denoting adherence to the rival

¹The Respondent also requested oral argument before the Board. This request is denied because, in our opinion, the record, including the exceptions and briefs, adequately presents the issues and the positions of the parties.

union while permitting employees to wear the membership buttons of the incumbent union.²

2. The Trial Examiner found, and we agree, that the Respondent discharged Loraine Evans for cause and not because of her union activity. We shall, therefore, adopt his recommendation to dismiss the allegation of the complaint that the Respondent violated Section 8 (a) (3) and (1) of the Act by its discharge of Evans.

3. The Trial Examiner found that Ann Hamilton, a leader in the rival union organizing activity, was transferred to more difficult work under circumstances which constituted a constructive discharge, in violation of Section 8 (a) (3) and (1) of the Act. The Respondent has excepted, and maintains that Hamilton was reassigned non-discriminately in the normal course of operations, and that she was discharged because she left the plant without permission in violation of a plant rule with which she was familiar.

Hamilton had been employed for about a year prior to her discharge, and had been considered a competent employee. In the course of her employ-

²The Respondent took no exception to the Trial Examiner's findings that these incidents occurred, but only to the conclusions that they constitute violations of the Act. As to the validity of these legal conclusions see, for example, *Airfan Radio Corporation, Ltd.*, 111 NLRB No. 97; *Delta Finishing Company*, 111 NLRB No. 114; *Graber Manufacturing Company*, 111 NLRB No. 20; *School-Timer Frocks, Inc.*, 110 NLRB No. 239, enf'd F. 2d, July 14, 1955, 35 LRRM 1329 (C. A. 4).

ment, she had been assigned to different positions from time to time. Some of these transfers were in accordance with the Respondent's practice of assigning qualified employees to different positions as need arose, while others were requested by Hamilton in order to broaden her experience.

On the day in question, reassignments of employees became necessary because of the absence of a repair girl. Hamilton was assigned to the take-off position on the large conveyor. She had never performed this particular operation, but had done take-off work on the small conveyor. These operations were apparently similar, the only differences indicated in the record being that the devices which had to be handled on the large conveyor were heavier and more complicated than those on the small conveyor. The operation was not unreasonably difficult, however, as it was regularly performed by women, some of whom had held this assignment without objection for a period of years.

As the Trial Examiner points out in his Intermediate Report, Hamilton requested gloves, which were generally worn on this operation. They were not immediately available, but were furnished to Hamilton in less than an hour. In the meantime, Hamilton claimed, her hands became badly scratched to the point where they were bleeding. Although she spoke to the plant nurse just before she walked out, she merely asked where the personnel clerk was, and made no request that the nurse treat her hands.

Hamilton had voiced no protest when she was assigned to the take-off position, made no request for assistance when she encountered difficulty with the work, and voiced no complaint when it seemed to her that fellow employees were jeering at her discomfiture. In addition to the leadwoman for the large conveyor, whose responsibilities include assisting the operators, there is a relief girl qualified and available to substitute for an operator who has to leave the production line for any reason. Yet Hamilton appealed for help to neither of these women. In fact, Hamilton at no time reported to any representative of management that her reassignment had created problems for her.

When Hamilton left the plant, she had been performing the take-off work for only about an hour. She left without a pass authorizing her departure, although she might have obtained one if she had consulted the nurse, as Foreman Kresin suggested she do when Hamilton asked him for a pass. She left during a rest period without making any attempt, during that period, to obtain a different assignment or to seek some other solution of her problems.

We are not convinced, on the basis of the entire record, that the temporary reassignment of Hamilton caused her such "hardship and suffering" or constituted a "substantially prejudicial alteration of the conditions of employment"³ to an extent that

³Cleveland Veneer Company, 89 NLRB 617, 622-623.

justified Hamilton's departure from the plant during working hours without permission.⁴ Under these circumstances, we find, as the Respondent contends, that Hamilton was discharged because she abandoned her job without authorization, and not because of her union activity. Accordingly, we shall dismiss the allegation of the complaint that Respondent discriminated against Hamilton in violation of Section 8 (a) (3) and (1) of the Act.⁵

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Essex Wire Corporation, a Michigan corporation, d/b/a Essex Wire Corporation of California, San Diego, California, its officers, agents, successors, and assigns, shall:

1. Cease and Desist From:

Demanding the surrender of executed union membership applications, prohibiting union activity in the plant during authorized employee rest periods,

⁴In view of our findings as to the nature of Hamilton's reassignment, we consider it unnecessary to pass upon the other defenses raised by the Respondent regarding the termination of Hamilton's employment.

⁵Member Murdock would find that Hamilton was constructively discharged, in violation of Section 8 (a) (3) and (1) of the Act, for the reasons set forth by the Trial Examiner in the Intermediate Report.

requiring the removal of union buttons worn by employees belonging to one organization while permitting the wearing of buttons designating another organization, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act

2. Take the following-affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its plant in San Diego, California, copies of the notice attached hereto as an appendix.⁶ Copies of said notice, to be furnished by the Regional Director for the Twenty-first region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent, immediately upon receipt thereof, and maintained for a period of at least sixty (60) consecutive days

⁶In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

It Is Further Ordered that the complaint be, and it hereby is, dismissed insofar as it alleges that the Respondent discriminatorily discharged Ann Hamilton or Loraine L. Evans in violation of Section 8 (a) (3) of the Act, or violated Section 8 (a) (1) of the Act by conduct other than that found herein to be violative thereof.

Dated: Washington, D. C., July 28, 1955.

[Seal]

NATIONAL LABOR RELATIONS BOARD,

GUY FARMER,

Chairman;

ABE MURDOCK,

Member;

IVAR H. PETERSON,

Member;

BOYD LEEDOM,

Member.

Appendix

Notice to All Employees
Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not demand the surrender of executed union membership applications, prohibit union activity in the plant during authorized employee rest periods, require the removal of union buttons worn by employees belonging to one organization while permitting the wearing of buttons designating another organization, or in any like or related manner interfere with, restrain, or coerce employees in the exercise of the right to self-organization, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

ESSEX WIRE CORPORATION
OF CALIFORNIA,
(Employer.)

Dated:

By,

(Representative.) (Title.)

This notice must remain posted for 60 days subsequent to its date, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CA-1921

In the Matter of:

ESSEX WIRE CORPORATION, A MICHIGAN
CORPORATION, d/b/a ESSEX WIRE COR-
PORATION OF CALIFORNIA,

and

ANN HAMILTON, an Individual.

Case No. 21-CA-2035

In the Matter of:

ESSEX WIRE CORPORATION, A MICHIGAN
CORPORATION, d/b/a ESSEX WIRE COR-
PORATION,

and

LORAIN L. EVANS, an Individual.

PROCEEDINGS

Monday, August 2, 1954

Pursuant to notice, the above-entitled matter came
on for hearing at 10:00 o'clock, a.m.

Before: Maurice M. Miller, Trial Examiner.

Appearances:

BEN GRODSKY,

Appearing on Behalf of the General Counsel of the National Labor Relations Board.

HOLT, MACOMBER & GRAHAM, By
WILLIAM MACOMBER and
FRANK ORFIELD,

Appearing on Behalf of the Essex Wire Corporation.

* * *

Mr. Grodsky: Ready to proceed.

I wish to have the reporter mark for identification and then I will offer in evidence as General Counsel's Exhibit 1, the formal papers in this proceeding being more particularly the following:

1-A, the Charge against the employer filed February 12, 1954;

1-B, Affidavit of Service of Charge together with return receipt showing receipt thereof by the respondent;

1-C, Complaint issued by the Acting Regional Director on June 17, 1954;

1-D, Notice of Hearing issued on the same date;

1-E, Affidavit of Service of Notice of Hearing, Complaint, copy of Charge, together with return receipt showing receipt thereof by respondent;

1-F, Affidavit of Service of the initial C Letter,

copy [9*] of the charge in Case No. 21-CA-2035, together with return receipt showing receipt thereof by respondent;

1-G, Charge filed in Case No. 21-CA-2035 on July 7, 1954;

1-H, the Order Consolidating Cases and Notice of Hearing and the attached First Amended and Consolidated Complaint both of which documents were issued on the same date being July 21, 1954;

1-I, Affidavit of Service of 1-H, and copies of the Charges previously described together with return receipts showing receipt thereof by the respondent;

1-J, Answer filed to the original Charge; and

1-K, Answer to the First Amended and Consolidated Complaint.

1-J was the Answer to the original Complaint and not the Charge. 1-K is the Answer to the First Amended and Consolidated Complaint which letter was handed to me this morning and it is timely, by the way.

I will now offer these documents in evidence after showing them for inspection to respondent's counsel.

Mr. Macomber: I have no objection. I assume they are what you say they are.

Trial Examiner: Very well. There being no objection, General Counsel's Exhibits 1-A through 1-K will be received in evidence.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Thereupon, the documents above referred to were marked General Counsel's Exhibits No. 1-A through 1-K, inclusive, and were received in evidence.) [10]

* * *

Mr. Macomber: In addition to such defenses as are urged in the Answer filed to the Amended Complaint wherein it is, of course, earnestly alleged by the defendant that there was no discrimination in either of these cases and that both of these employees were, one was discharged for cause and the other voluntarily quit, we wish to raise the further point insofar as it may be appropriate, we take the position that a company cannot be guilty of discriminating against an individual who is a member or agent acting for and on behalf of an unauthorized union.

Therefore, if it should appear that the activities of either of these individuals were in connection with, say, the United Mine Workers, an organization which, I understand, has not qualified, or been authorized by reason of the failure to file their non-Communist affidavit and if by some evidence presently unknown to this respondent an inference should be raised of discrimination, we want to raise the further issue that there would not, we could not be guilty of discriminating against such activity. [11]

* * *

Mr. Grodsky: Mr. Examiner, before proceeding with the evidence in the case, I wish to amend

Paragraph 4. I already mentioned it to respondent's counsel in passing and he is enthusiastically in favor of the amendment except it doesn't go far enough to eliminate, in part, my contentions.

I amend it by striking out the phrase after the word "respondent," strike out the phrase, "beginning on a date uncertain but approximately November 20, 1953," and I wish to replace that by the phrase, "on February 10, 1954."

Mr. Macomber: Is that in Paragraph 3?

Mr. Grodsky: No, No. 4. Right after the word "respondent." Right at the beginning.

And then in the fourth line, it says, "to various other employments." Strike out the phrase, "various other employments," and substitute therefor the words, "to a job," so it will read, "to a job of a more difficult and disagreeable character."

And in the second to the last line in the same paragraph change the words "work assignments" to "work assignment," singular.

The purport of that amendment, Mr. Examiner, I just want to address myself briefly to it, if my further investigation [12] reveals that there is no provable earlier discrimination with reference to what assignments, work assignments, it is contended specific work assignments about which we shall have evidence was made for discriminatory reasons.

Trial Examiner: Very well. Now the question of the amendment of the Complaint has been raised, I may ask in the light of Mr. Macomber's earlier statements whether the General Counsel is agree-

able to the amendment of the case caption in line with the point made by Mr. Macomber?

Mr. Grodsky: Yes, as I understand it, where it says "Essex Wire Corporation" you request that "Essex Wire Corporation, a Michigan Corporation."

Trial Examiner: Yes, with reference to "Wire Corporation of California" deleted.

Mr. Grodsky: No, it's doing business as Essex Wire Corporation of California.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

It is my understanding as a result of the discussion off the record that the parties are agreed that an appropriate case caption in this case would read "Essex Wire Corporation, a Michigan Corporation, d/b/a Essex Wire Corporation of California," and upon that understanding having secured the consent of all counsel during our discussion off the record, [13] I will grant what I assume to be the motion to amend in that respect.

Well, before I rule on the other aspect on the motion to amend, I will ask if there is any statement respondent wishes to make.

Mr. Macomber: I have no statement other than that already made.

Trial Examiner: Very well, the motion to amend with respect to Paragraph 4 of the Consolidated Complaint is granted. [14]

Mr. Macomber: * * * We have not furnished in response to that subpoena, the No. 1 item, which calls for all invoices, bills of lading and so forth because we apprehended that the purpose of such evidence would be solely to bear upon the question of jurisdiction and proof of interstate activity of this corporation and it is our intention to and we do now concede the jurisdiction of the Board over the Essex Wire Corporation of Michigan. [15]

* * *

MITCHELL J. SIMON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. What is your name, sir?

A. Mitchell J. Simon.

Q. What is your position with Essex Wire Corporation?

A. Manager of production on the Pacific Coast.

Q. What is your business address?

A. 1305 Harbor Drive, San Diego, California.

Q. Mr. Simon, as manager of the San Diego Branch of Essex Wire Corporation, you have complete control of the activities of the plant in question here?

A. Insofar as the corporation policies and rules and regulations are concerned, yes.

(Testimony of Mitchell J. Simon.)

Q. And you are familiar with the production supervisory setup of the plant? A. I am that.

Q. And immediately under you who is next in charge? A. Mr. Fred Harms.

Q. H-a-r-m-s? A. Yes.

Q. His title is plant superintendent?

A. That is correct.

Q. What is the title of the next layer of supervisor that [16] you have in the plant?

A. General foreman.

Q. Do you have one or more than one general foremen? A. We have three.

Q. And are there foremen who are responsible to the general foreman?

A. The assistants or section foremen as they are called.

Q. How many of those assistants or section foremen do you have?

A. I'd say better than six. I can't give you the exact number.

Q. And are there any supervisors below the rank of assistant foreman?

A. None, not in a supervisory capacity. We have people which we refer to as lead people. These lead people by the context of the corporation policies spend more than 80 per cent of time engaged in actual production.

Q. Is Helen Greenwood a leadlady?

A. She is.

Q. Is Peggy Redden a leadlady?

(Testimony of Mitchell J. Simon.)

A. She is, Peggy Redden, R-e-d-d-e-n.

Q. Are they hourly paid? A. They are.

Q. How many girls does Greenwood have working with her?

A. Offhand, I would say somewhere in the neighborhood of 15. [17] Now that could go either way.

Q. What is the group over which she is lead-lady?

A. Rotary conveyor table, the large one.

Q. And Peggy Redden is the leadgirl over what group?

A. She takes care of the small rotary table. Also, miscellaneous on the taping machines.

Q. How many girls does she have working with her?

A. That fluctuates quite a bit. I would say 10 and over.

Q. Ten and over? A. Yes.

Q. What would be the maximum that she would have?

A. I can't quote that. It fluctuates, depends on production. I would say 10 to 20.

Q. All right. And who is the immediate supervisor of Peggy Redden?

A. Mr. Kresin, K-r-e-s-i-n.

Q. His title is what?

A. Assistant foreman or section foreman. We refer to him as both. Also, refer to him as section supervisor.

Q. Who is the immediate superior of Helen

(Testimony of Mitchell J. Simon.)

Greenwood? A. Same man.

Q. How many employees are there under the general supervision of Mr. Kresin?

A. Over 30. [18]

* * *

Q. That is what I want to know. How many has he had control, how many he had under his control at any given time?

A. Around 40 of a maximum. I am quoting that figure as approximate. [19]

* * *

Q. (By Mr. Grodsky): And along the same lines, Mr. Simon, the girls who are working on this conveyor table, are they stationary, or do they walk along with the conveyor in order to accomplish their own position?

A. We give them their own choice.

Q. In other words, some of them will be stationary and others will walk along with it?

A. As an example, I can give you one that will answer your question, I think. At one time I was approached by the leadlady, a group of girls that work on the conveyor wanted to know if they could sit down and do the operation because they [26] got kind of tired standing up doing the operation walking all day and I told them it had been my experience that you could sit down and do this job efficiently, I had seen that done and if they could sit down and do the job and not miss the jig, they would be welcome to do it. Some of them do it

(Testimony of Mitchell J. Simon.)

sitting down and others standing where the girls follow the jig all the way up or down toward the end of the conveyor. I proposed the question to the employees there why they just didn't wrap the certain position of it and let it go to the next girl instead of chasing up eight, ten, fifteen feet, and they say it breaks the monotony and they want to walk up.

Whatever pleases them is all right with us as long as the job runs efficiently. That is all we are concerned with. If we get the production quality, it makes no never mind.

Q. Now, who is, do you have a particular girl who customarily, whose steady job it is to remove the wire from the jigs and to place it on the overhead conveyor?

A. We did have at one time and the girls all thought it would be reasonable to change those people off because changing the people around gives each one a crack at it. We did when we originally started that table five years ago, started out having one girl do that job and she did it for, oh, I would say, these girls did it for about a year at a time and evolution, or whatever you might call it, a girl quits or another one comes on and so on and they change off. All [27] the girls change positions on the one side various times during the day now.

Q. Mr. Simon, referring now to before February of this year, did you have one steady girl who was regularly assigned to that job?

Mr. Macomber: You mean before February 10?

(Testimony of Mitchell J. Simon.)

Mr. Grodsky: That is correct.

The Witness: What do you mean by regular, how long?

Q. (By Mr. Grodsky): Well, now you say that you put that table into operation five years ago. Is it the sense of your testimony that a girl assigned there at that time and she worked approximately a year on that job?

A. It depends. I say about a year.

Q. Who was that girl?

A. Well, we have had three or four. The last girl, I believe, that worked there for a long period of time was, oh, she's a lady about 48, Mrs. Totito, Mrs. Freda Totito.

Q. About how long did she work there on that job?

A. I would say between six months and a year, offhand. I don't know.

Q. When was she taken off that job, do you recall?

A. No, I can't.

Q. Did you have anything to do with her being taken off that job?

A. Well, I don't know whether I had anything to do with it [28] directly. However, we have the mutual agreement, since the company reserves the right to transfer anybody within their classification at any time, we have a mutual agreement that in the event an employee and, usually a female, has any complaint about a particular job that she make a request in writing to the company stating her reasons why she can't do such a job.

(Testimony of Mitchell J. Simon.)

Then we will send her to the company doctor for examination. If the doctor makes a determination or recommends that she be taken off temporarily, we will do it. The reason that we go through that elaborate system is that our general assembly department runs as high as 150 women. One can't stand up and the other can't sit down and we have mutiple problems with what people can't do. So we have become, we have come to the point where we couldn't at everybody's desire change them when they like to be changed. It is just not conducive with good production.

Q. Getting back to the question of Freda Totito, do you know why she was taken off that job?

A. No, I believe she had some legitimate complaint.

Q. Do you recall whether it was leg trouble?

A. I don't know. I know she did have a medical problem. Let's put it that way.

Q. When she was taken off the job, who was put on that job?

A. I can't quote the names for you but I imagine we can go [29] back and find out.

Q. Do you know when Freda was taken off that job, approximately?

A. I can't quote that date, either.

Q. The girl who took her place, did she work on that job for any extended period of time?

A. That I don't know, either.

Q. Do you know who was—strike that.

(Testimony of Mitchell J. Simon.)

Was there in addition to the person who was assigned to that position another girl who was assigned to act as relief for the specific girl?

A. Well, as I stated before, we had two people relieving that table. I also stated that recently, and which will include the date you are speaking of, those girls in that front line had been changing off.

Q. Your testimony, Mr. Simon, is that before February 10, 1954, all of the girls who worked on that conveyor table had also at one time or another worked on that specific job?

A. No, sir. I never testified to that. I said the girls in that immediate section around the table, maybe three or four down.

Trial Examiner: Just a moment. Just to get this clear, when you say the three or four girls immediately adjacent to this station, the three or four girls at the station immediately adjacent to the point at which jigs are lifted [30] off and put on the conveyor——

The Witness: The harnesses.

Trial Examiner: The girls occupied the three or four stations had been participating in the shifting arrangement?

The Witness: As I mentioned, Mr. Miller, it was at the convenience, as the girls pointed out, "We would like to do so and we would like to do so."

And we just told them, "If you can do it in that manner and still get out our production in efficiency, that is fine."

(Testimony of Mitchell J. Simon.)

So they worked it out among themselves. It was not a question of a definite time that they were to go here and to go there and so on.

Trial Examiner: If I understand Mr. Grodsky's last series of questions correctly, then, he is attempting to elicit your best recollection as to whether that arrangement involving the girls at these three or four stations, was in effect in February of this year?

The Witness: I would think so. You see, the reason I can't answer him point blank is that I have two plants to cover and I have got a lot of administrative work and I'm not as close to the actual operation.

I usually get in it when there's some problems but I do make my rounds through the plant, make them three or four times a day.

Q. (By Mr. Grodsky): Do you know an employee who was known [32] as Jo? Her name probably was Josephine?

A. That is not much of a description. I have got to have more than that.

Q. I will suggest to you that an employee by that name took Freda's job when Freda was taken off the removing of harnesses and putting on the conveyor?

A. I'd have to see the face. I'm sorry.

Q. Some jobs in the plant are more tedious than others, aren't they? A. Yes, sir.

Q. Some jobs are more difficult in terms of requiring more effort than others?

(Testimony of Mitchell J. Simon.)

A. Well, sure, absolutely. We have probably 100 different operations.

Q. How would you characterize this particular job of lifting harnesses from the conveyor and putting them on the overhead conveyor, would you consider that a difficult job or a simple one?

A. No, I would say it's about medium. We have some easier and we have some worse.

Q. (By Trial Examiner): How high is the level of the conveyor tables on which the jigs move, the conventional table height or a little higher?

A. I'd say just slightly higher than a conventional table. That table about that height and then the jig sits on it and [32] I'd say go up about 10, 11 inches.

Q. How high from the floor is the overhead conveyor from which the completed harness has to be lifted?

A. If you bent the harness this way and held it in your hand you can take it shoulder high and take it off.

Q. What sort of overhead conveyor is this, a belt or chain?

A. A chain that has hooks hanging down and runs in a track.

Q. And the operation of lifting involves lifting the completed harness and placing it on the hook as the hook passes?

A. Yes, there are many hooks that pass one that is available and then they hang it on.

Q. It passes at approximately shoulder height?

(Testimony of Mitchell J. Simon.)

A. Well, the hooks are higher than shoulder height. However, you take the harness off and bend it like that and hang it up at shoulder height. You get hold the harness up here and bend it over.

Q. The point I was making, would it involve an arm movement in which the arm would not have to be raised, if I understand you correctly, higher than shoulder height?

A. Depends on how the individual handled it. I would say the proper way of doing it——

Mr. Macomber: May I intrude with one question?

Trial Examiner: Yes.

Mr. Macomber: What is the approximate weight of that [33] harness?

The Witness: Seven or eight pounds, I guess.

Q. (By Mr. Grodsky): You indicated that it's a rather simple job if someone knows how to do it, is that what the nature of your testimony was?

A. I didn't say it was simple. I said it was medium. We have some less difficult some more difficult.

Q. My present question went to the question is there particular skill or know-how involved?

A. Not particularly.

Q. In other words, it's your opinion that anyone without any previous knowledge of how to do the job could come up and do it without much expenditure of effort?

A. You say expenditure on the part of the

(Testimony of Mitchell J. Simon.)

person doing it or on the effort on the part of training?

Q. Effort on the part of the person who is doing it. I'm assuming that there is no training.

A. I would say merely lifting something off the pin in just loosening the wires and take it off the jig and hang it up. Whatever effort it takes to do the job, that is it. I'm leaving it to your not seeing the job. If you saw it you could determine for yourself.

Trial Examiner: Just a moment. I may say that one of the difficulties that we face in all of these problems where we are building a verbal record is that whereas if a view [34] of the premises is highly desirable for a person such as myself who has that duty to make the initial findings of fact, the record is going to be reviewed in Washington where all that will be available is the printed page so we have to make the verbal descriptions which appear on the printed page regardless of what my situation may be.

The Witness: I realize that but I see through a different pair of eyes than you do because I have seen this operation so many times and I say there is relatively nothing to learn.

Q. (By Mr. Grodsky): In your last answer, I noticed that you were illustrating by moving your hands and you referred to removing the harness from the various pins in a number of spots. I think you moved your hand about five or six places?

A. That is correct, yes.

(Testimony of Mitchell J. Simon.)

Q. From your observation of the operation in the plant does the girl who removes that harness work it from a large number of stations or does she just generally lift off the harness at one end and then lift it off at another end and then shake it loose?

A. It depends on the individual. Some of them have done it, shake them. Others go along and walk along the conveyor and pull them off. Others stand there and as the rotary comes by they pull it off as it comes past. It depends on the manual dexterity of the individual. Everybody has a different [35] way of doing things.

Q. When a girl lifts up the harness she has taken off the jig, does she have to move her body in any way in order to put it on to the overhead conveyor?

A. She turns around and, I would say, takes a maximum number of steps, about three and then returns.

Q. Do you know whether or not the girl who has that job customarily wears gloves?

A. Some do. I think most of the time they do.

Q. Do you know why they wear gloves?

A. I don't know. Maybe to protect their dainty hands. They are females and pretty proud of their hands.

Q. Does the company furnish the gloves?

A. Yes, sir, as a matter of courtesy.

Q. Now getting back to the question of the as-

(Testimony of Mitchell J. Simon.)

signment of girls for the jobs, who tells the girls what jobs they are to go to at the assembly line?

A. Sometimes the foreman tells them, sometimes the foreman tells the leadlady to go and get so and so and put them on such a job.

Q. In other words, it's your testimony that the foreman is the one who determines what position the girl is going to work on on the line?

A. Generally, yes, sir. The leadlady does, knows the individuals and, as a rule, most of the same people other than [36] this one particular station you are talking about are there all the time.

Q. Now on this one station, I'm talking about prior to December, February 10 of this year. Is it your testimony that on this station there was a difference in the way in which there was a job assignment than as to other stations? A. No.

Q. Well, in your last answer you said that generally the same people are there all the time except for this one station? A. That's right.

Q. What is there different about this one station?

A. Just that it is the last station and not the most desirable spot on the rotary conveyor.

Q. Does that have any difference to do with who makes the assignment? I was only talking to you, Mr. Simon, about who makes the assignment.

A. I repeat, the foreman generally makes the assignment and sometimes leaves it to the discretion of the leadwoman.

(Testimony of Mitchell J. Simon.)

Q. Then the leadwoman does have the responsibility at times to make the assignments?

A. To go back in the testimony, I said that the lead person is the person who works immediately under the assistant foreman and spends at least 80 per cent of their time in full production work which leaves 20 per cent of the time doing a [37] sort of supervisory work.

Q. There is a Mrs. Barnes in the corporation, in the organization?

A. That is so.

Q. What is her position?

Mr. Macomber: May I have the first name?

The Witness: Mrs. Esther Barnes. Typical of a small plant, her job, like the rest of us, covers multiple things. We are not large enough to have a personnel department as such, insurance department as such and so on and so forth so she is a combination, the personal files, employment, payroll, bond deductions, et cetera, insurance, all dealing with records of individual employees. And a sympathizer, I might add, for anyone who wishes to weep.

Q. (By Mr. Grodsky): Is there a Tom Walton in the organization?

A. Tom Walton, yes.

Q. Is that W-a-l-d-e-n?

A. Thomas E. W-a-l-t-o-n.

Q. What is his position or title?

A. He doesn't particularly have a title. He is the general all around man. I use him on special assignments, use him for cost work, use him for

(Testimony of Mitchell J. Simon.)

supervising of office and clerical personnel, anything I might happen to want him for.

Q. He is directly responsible to you, is that it? [38] A. That is correct.

Trial Examiner: Does he have any plant responsibilities or are his responsibilities limited to the operation of your office?

The Witness: No, he has no special assignment of plant responsibility.

Q. (By Mr. Grodsky): I will show you General Counsel's 2 for identification and ask you if this document was turned over to me in response to the subpoena as the no-solicitation rule which was posted in the plant? A. That is correct.

* * *

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 and was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 2

(Copy)

Bulletin
Notice

1-14-54.

To: All Employees:

It Has Come to Our Attention That Our Employees Are Engaged in Union Campaigning During Working Hours. Any Such Campaigning for

(Testimony of Mitchell J. Simon.)

Any Union During Working Hours Is Contrary to Company Rules and, Therefore, Those Involved Are Subject to Disciplinary Action.

We Request Those Involved Campaigning for Any Purposes on Company Time Refrain From: These Practices in Order That We May Not Become Involved in Some Undesirable Incidents.

/s/ M. J. SIMON,

M. J. SIMON.

MJS:er

Received in evidence August 2, 1954.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Grodsky): I now show you General Counsel's 3 for [39] identification and ask you if this is the agreement which was in effect between Essex Wire Corporation and IAM Local 1930, for the period of January 15, 1953, to May 15, 1954?

A. That is correct.

* * *

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 3 and was received in evidence.)

(Testimony of Mitchell J. Simon.)

GENERAL COUNSEL'S EXHIBIT No. 3

Agreement Between
Essex Wire Corp.
of San Diego, California
and
International Association of
Machinists

Automotive Electric Lodge No. 1930

Agreement

This Agreement made this 15th day of January, 1953, by and between the Essex Wire Corporation of California of San Diego, California, hereinafter called "the Company," and the International Association of Machinists, Silvergate District Lodge No. 50, for and in behalf of Automotive Electric Lodge No. 1930, hereinafter called "the Union," when accepted by the parties hereto, and signed by their respective agents thereunto duly authorized, shall supersede all previous Agreements by and between the parties hereto, and shall constitute the sole agreement between them.

Article II.

Recognition:

1. The Company recognizes the Union as certified the 22 day of July, 1948, by the N.L.R.B. as the exclusive Collective Bargaining Agency for all employees of the Company excepting Office and

(Testimony of Mitchell J. Simon.)

Clerical employees, Guards, Professional employees and all Supervisors as defined in the National Labor Relations Act.

* * *

Article XIV.

Rest Periods:

The Company agrees not to change its current practices in regard to rest periods without negotiation with the Union.

* * *

Duration and Effective Date:

This Agreement shall become effective on January 15th, 1953, at 12:01 a.m. and shall remain in full force and effect until May 15th, 1954, Midnight. On May 15th, 1954, and at the end of each yearly period thereafter, this Agreement shall be renewed automatically for periods of one (1) year unless either party gives written notice of its desire to terminate or amend same at least sixty (60) days prior to each yearly expiration period. In the event notice of desire to modify or amend is properly given by either party in accordance with the above Section, the parties shall meet within a period of ten (10) days subsequent to the commencement of the sixty (60) day period hereinabove referred to, if practical, and shall exchange simultaneously the desired amendments in writing at this meeting.

At this meeting the parties hereto shall set up a date and proposed schedule for further negotiations.

(Testimony of Mitchell J. Simon.)

During said negotiations this Agreement shall remain in full force and effect except that it may be terminated by either party upon five (5) days notice in writing, provided however, termination may not occur prior to the yearly expiration date.

During said five (5) day period negotiations shall continue at the request of either party. The parties may, by mutual agreement, extend termination date.
Company:

M. J. SIMON,

WALTER F. PROBST.

International Association of Machinists, Automotive
Electric Lodge No. 1930:

FREEMAN C. BROWN,
Business Representative;

HELEN SMALLWOOD,

MARY C. GALLEGOS,

ETHEL R. YOUNG,

M. IRENE COLLETT.

Received in evidence August 2, 1954.

Q. (By Mr. Grodsky): I show you General Counsel's Exhibit No. 4 for identification and ask you if this is the current agreement between the company and Local 1930 IAM?

A. That is correct.

(Testimony of Mitchell J. Simon.)

Mr. Grodsky: I will now offer General Counsel's Exhibit No. 4 in evidence.

Mr. Macomber: I'd like to, if I could at this point, it might be appropriate to recall one short paragraph of it to the attention of the Examiner.

Trial Examiner: Very well.

Mr. Macomber: Under Article 8 which deals with the seniority provisions, Paragraph 5 thereof, the following appears: "The employer shall have the right to temporarily [40] transfer any employee from one department to another. Any employee temporarily transferred shall retain his seniority in his old department."

Trial Examiner: Very well. With that matter noted for the record, is there any objection to the receipt in evidence of General Counsel's 4?

Mr. Macomber: No objection.

Trial Examiner: Very well, General Counsel's 4 will be received in evidence.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 4 and was received in evidence.)

* * *

GENERAL COUNSEL'S EXHIBIT No. 4

Agreement

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by and between the Essex Wire Corporation of

(Testimony of Mitchell J. Simon.)

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(Testimony of Mitchell J. Simon.)

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Received in evidence August 20, 1954.

(Testimony of Mitchell J. Simon.)

Q. Now, during the, in the period—strike that. This notice about no solicitation which was posted in January of 1954, is that the first time that you posted a [41] notice of that sort?

A. The first time we knew of any factual dispute that existed was two weeks before that and causing a lot of disharmony so I requested guidance on it and that is the note I posted to try to avoid any incidents.

Q. When you say you requested guidance, that was from your Detroit office?

A. Legal department.

Q. In Detroit, is that right? A. Yes, sir.

Q. Did you observe any employees wearing union buttons in the plant?

A. You are speaking of which?

Mr. Macomber: When you, can you limit that as to time?

Mr. Grodsky: That is my next question. First I want to know if he noticed anything like it.

The Witness: The union representing the people, the union contract that was in effect have alternately worn them and not worn them, I mean——

Q. (By Mr. Grodsky): Like prior to the time when you posted the notice, had they worn those buttons? A. They, who?

Q. The IAM faction in the plant?

Mr. Macomber: I think he has already answered that some wore them and some didn't. Now, do

(Testimony of Mitchell J. Simon.)

you mean by "they" [42] all of them or with the qualification of his answer?

Mr. Grodsky: I will rephrase the question.

Q. (By Mr. Grodsky): You told us that you, that what impelled the posting of the notice was that you were aware of some factional disharmony among the employees, is that correct?

A. Yes, sir.

Q. Were any employees at that time wearing union buttons and by that time, I mean prior to the time when you posted that notice?

A. Do you mean IAM union buttons?

Q. Yes, IAM union buttons.

A. They wore them, some wore them, some didn't wear them.

Q. Were any employees wearing any other kind of union buttons before the time that you posted that notice?

A. Yes, sir.

Q. Those are buttons on behalf of what organization?

A. United Mine Workers.

Q. Did you notice when they started wearing those buttons?

A. About 8:30 in the morning about two days prior to the notice.

Q. At that time had you already written to Detroit for advice?

A. I called them on the telephone.

Q. You called them after you saw the buttons, is that it? [43]

A. I called them, yes. I had the questions asked

(Testimony of Mitchell J. Simon.)

me that I didn't feel qualified to answer so I called Detroit for guidance.

Q. What was the nature of the questions that were asked you?

Mr. Macomber: Do you mean from Detroit?

Mr. Grodsky: No, he said he called Detroit on the basis of questions he felt unqualified to answer. I'm trying to explore what the questions were.

The Witness: I had questions from the rank and file and from the supervisors. The rank and file had been going to them. They were all upset. The factual dispute was in progress as we came out in blossom.

Mr. Macomber: Came out to what?

The Witness: With the advent of these events, with the people all up in arms, the rank and file people all disturbed, they wanted to know what we were going to do about it. I called Detroit for guidance. After my telephone call, I sent out instructions to my chain of command.

Q. (By Mr. Grodsky): Were those written instructions? A. No, sir, oral.

Q. You say the rank and file were up in arms. Who among the rank and file employees spoke to you, if you recall?

A. About four, I believe, that morning.

Q. Well, will you name them, please? [44]

A. Betty Cave, Freda Totito, Helen McLewin, one other person who escapes me right now.

Q. Betty Cave had some position with the local, didn't she?

(Testimony of Mitchell J. Simon.)

A. She was committee woman for final assembly.

Trial Examiner: IAM committee woman?

The Witness: Yes.

Q. (By Mr. Grodsky): And does Helen McLewin, did she at that time hold any position?

A. I can't tell you that. I don't know offhand.

Q. Wasn't she a member of the grievance committee at that time?

A. I will have to go back in the record to find out. I'm not sure. I don't want to answer your questions when I'm not sure, if you don't mind.

Q. In fact, I approve of that.

A. I'd rather say something now—I would rather say I don't remember than to say something now that I'm not sure of and later have you say, "Well, you said so in your testimony."

Q. I completely agree with you, Mr. Simon.

Now, what was it that Betty Cave was concerned about, what did she talk to you about, if you can recall?

A. It wasn't Betty Cave, it was a group.

Q. A group came to you as a delegation?

A. Four people, I guess you call it a delegation if four is [45] a delegation.

Q. Who acted as spokesman for the delegation?

A. None of them, they all rattled on.

Q. What was the nature, what is the gist of the complaint?

A. The gist of the complaint was they had such harmonious relations for all these years and why must they work under these conditions of pressure

(Testimony of Mitchell J. Simon.)

and arguments and so on and so forth. They were upset, I imagine, about the factional dispute.

Q. Well, Mr. Simon, inasmuch as you are not going to testify what you are not certain about let's please let your imagination out of it, too.

A. If you so desire, I will.

Q. Fine. Now, did you ask them specifically what pressure or arguments they were referring to or did they tell you specifically of any situations?

A. Generally, they were talking about the campaigning, people were wearing buttons, how could they wear buttons when there was a union in there that represented them and so on.

My answer to them was that you will have to take things in your own hands, your instruction should come from your business agents at your union hall.

My legal department has told me that there is nothing that we can do about getting into any factual dispute [46] because we are regulated by law. As far as we are concerned, there will be no campaigning done on company time by either party for any union activities and should you people decide you are going to do something about it, we will have to treat you in the same manner. I also told a group——

Q. Just a minute now. I am trying to restrict it to this one conversation before the time you spoke to Detroit. Now when was that? A. After.

Q. This is after you spoke to Detroit?

A. That's right.

Q. Before you spoke to Detroit, they had com-

(Testimony of Mitchell J. Simon.)

plained to you about campaigning and about the wearing of union buttons?

A. I got the word through the plant that morning that buttons were out and people were upset and before I proceeded, I called Detroit.

Q. I see. Then you called Detroit before these four people came up and talked to you?

A. Yes, sir.

Q. I see. I misunderstood you.

Then, what prompted you to call Detroit?

A. Legal guidance. I have been in this unionism and management thing for a number of years and I just wanted to be sure that since I don't have any means of knowing the changes in the laws and can't quote all the laws, we have a [47] department that does that thing and I don't take the responsibility upon myself for something with which I am not familiar with. I'm a production man.

Q. As I understand it, you called Detroit because you saw these buttons blossoming out?

A. I heard through the foremen and superintendents and the supervisors that people were all upset, buttons were out that morning and people were up in arms about it and before I made any moves I called Detroit.

Q. When you called Detroit, just what instructions did you receive from Detroit?

A. That we could not participate in any factual dispute, that it was none of our business, that in order to keep our production rolling that all we were able to do was to tell the people that we would

(Testimony of Mitchell J. Simon.)

not allow any campaigning during working hours and I questioned specifically about the buttons and campaigning material and they told me as long as they aren't being handed from one to another on the job during working hours that there was nothing that we could do about it.

Q. And that was, as you testified, about two days before the date that you posted the notice?

A. Yes, sir.

Q. And then, I suppose, if you will permit me to indulge in my imagination, Detroit told you they were sending you a [48] notice which you would post on the bulletin board? A. No.

Q. No?

A. They told me what I could say on the phone.

Q. I see.

A. And I wrote up the notice and posted it.

Q. Why was there a delay of two days if I may ask? A. No reason.

Q. Didn't you consider it rather important to get this notice posted as soon as possible?

A. Not particularly. We had been in these fights before.

Q. How long after your telephone call to Detroit was it that this committee approached you?

A. I think it was probably the next day.

Q. And in the meantime your foreman had told you that there was this factual arousing?

A. Yes.

Q. But you didn't consider it sufficiently important to get that notice out immediately?

(Testimony of Mitchell J. Simon.)

A. They had their oral instructions and I felt they were competent enough to pass that on.

Q. Now, did you direct any employees to remove their union buttons at any time?

A. No, sir. There is one fellow there after I had made my call, I passed through the department, usual routine, by the [49] name of Pipmeier. He was adjusting his button on an apron or shirt, I can't recall which, and had just walked away from another employee by the name of Vivian Moore. I walked up to Mr. Pipmeier and I said, "Look, Jerry, I want to avoid any trouble, any incidents, and we haven't had any trouble and you have never given me any trouble and I don't want you to start now. I can't do anything about you wearing that button but I can do something about you passing that button from one person to the other and I don't know whether you just took it from Vivian or what happened, but if I see you passing buttons or campaigning material from one person to another during company time, I'm going to fire you.

I also made that statement to James Juhl in the presence of Mr. Casey and Mr. Lee Baker on two occasions that I didn't care what they did outside or what union they wanted or who they wanted to represent them but they weren't going to do it on company time.

Q. Did you have any occasion to tell any employees favoring the IAM the same thing?

A. I did that to the same four people that I spoke to you about that approached me.

(Testimony of Mitchell J. Simon.)

Q. Did you talk to them about wearing IAM buttons?

A. I told them exactly the same thing.

Q. Now, did you talk to Mr. Pipmeier before or after the notice had been posted? [50]

A. Before—it was after the phone call.

Q. And to Mr. Juhl, you testified you spoke on two separate occasions?

A. That was after the notice had been posted. I also spoke to Miss Evans after the notice had been posted when she questioned me about the wearing of buttons.

Mr. Macomber: Just as a point of information, I am wondering if I may be advised as to whom the two young ladies are flanking you, Mr. Grodsky?

Mr. Grodsky: I should indicate that this is Mrs. Hamilton and Mrs. Evans, the two charging parties in this proceeding.

I will state, also, for the record that this is the first time I have had the enviable position of being flanked by two young ladies in one of our Board cases.

I have no further questions of Mr. Simon.

Mr. Macomber: I have no questions at this time.

Trial Examiner: You may be excused.

(Witness excused.)

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: The hearing will be in order.

Mr. Grodsky: I call Miss Ford, please. [51]

EUNICE FORD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. State your full name, please.

A. Eunice Ford.

Q. What is your address, Mrs. Ford?

A. 440 Maryland Street, San Diego.

Q. What is your position in the company?

A. I run a taping machine.

Q. Will you please speak up, Mrs. Ford?

A. I run a taping machine.

Q. Who is your leadlady?

A. Peggy Redden.

Q. In February of this year, did you hold any position with the International Association of Machinists Local? A. I was financial secretary.

Q. Of Local 1930? A. That's right.

Q. In the plant, is that correct?

A. That's right.

Q. Did you have any discussion with any supervisor about Ann Hamilton on the last day that she worked in the plant?

Mr. Macomber: May we have that person identified before she commences any conversation? [52]

(Testimony of Eunice Ford.)

Mr. Grodsky: Yes. It was a preliminary question.

Q. (By Mr. Grodsky): On the last day that she worked in the plant? A. I talked to Peggy.

Q. Peggy Redden? A. Peggy Redden.

Q. And about what time of the day did you talk to Peggy?

A. Between 8:00 and 9:00 in the morning.

Trial Examiner: Are we speaking of February 10?

Mr. Grodsky: Yes.

Q. (By Mr. Grodsky): And will you tell us what you said to Peggy and what Peggy said to you on that occasion?

Mr. Macomber: I'm going to object at this time on the grounds that it is hearsay, no proper foundation laid as to any conversation or statement on behalf of Peggy Redden that would be binding upon the corporation.

Trial Examiner: Does the General Counsel expect to contend that Peggy Redden is a supervisor within the meaning of the Act?

Mr. Grodsky: Mr. Examiner, I wish to contend that, and in any event, this conversation is in part preliminary and I think it will be tied up satisfactorily. Now, I will just make it on that basis.

Trial Examiner: On that representation, I will permit it subject to motion to strike if counsel sees fit to make [53] such motion after the proof has been offered.

Mr. Macomber: Very well.

(Testimony of Eunice Ford.)

Q. (By Mr. Grodsky): What did you say to Peggy and what did she say to you?

Mr. Macomber: I wonder if we may have a foundation of names of anyone else present?

Q. (By Mr. Grodsky): Was anyone else present at this time who was in a position to hear the conversation? A. No.

Q. Where did the conversation take place?

A. At my taping machine.

Q. What did you say to Peggy and what did she say to you?

A. I said to Peggy, "Let's put Ann on the conveyor."

Mr. Macomber: Let's what?

The Witness: Put Ann on the conveyor.

Q. (By Grodsky): Did you give any reason why Ann should be put on the conveyor?

A. Well——

Q. I'm not asking if you had any reason, I'm asking did you tell Peggy anything.

A. All I said was, "Look at Ann sitting on her dead butt. Let's put her on the conveyor."

Q. What did Peggy say, if anything?

A. "I will go see about it."

Q. Did you observe whether she went to speak to anybody? [54]

A. She went straight to Betty Cave.

Q. Did you overhear any conversation?

A. No.

Q. Did Betty talk to you at any time later about Ann Hamilton? A. Yes, she did.

(Testimony of Eunice Ford.)

Q. When did she speak to you next?

A. I can't tell you any time on it.

Q. About how long after this first conversation?

A. I don't know.

Q. Was it—— A. It was that morning.

Q. Well, when she spoke to you, was Ann still working on the taping machine? A. Yes.

Q. It was before Ann was moved over to the conveyor? A. Yes.

Q. What did Peggy say to you at this time?

A. When she came back to my machine I asked her, well, I just asked whether she had done it or not and she said—I'm quoting now what Peggy told me—she said, "Simon don't give a damn what you do."

Q. Was anything else said on this occasion?

A. No.

Q. Do you know an employee by the name of Freda Totito? [55] A. Yes, I do.

Q. Do you know what position—strike that.

Did you observe that she had a job of removing harnesses from the rotary conveyor or putting them on the overhead belt? A. Yes.

Q. Do you know how long she had that job before she was transferred from that job to another job? A. Yes, about three or four years.

Mr. Macomber: Three or four what?

The Witness: Years.

Q. (By Mr. Grodsky): How do you know that?

A. Freda told me.

Mr. Macomber: I'm going to move to strike an-

(Testimony of Eunice Ford.)

swers based on hearsay if that is the basis of her answer, Mr. Examiner. He said, "How do you know that?" And she said, "Freda told me."

The Witness: I have seen her.

Trial Examiner: Just a moment. If the truth of the matter that is asserted, namely, Totito's tenure, is the important fact here, I think the objection is well taken.

Mr. Grodsky: Mr. Examiner, Freda is still an employee in the plant, I believe. She could be made available to testify. Respondent has the records and is in a position to know the facts.

Mr. Simon testified only from the best of his recollection [56] which he himself admitted was not too substantial. I believe that this lays a foundation for a finding that her employment in that position was far longer than the six months that Mr. Simon estimated.

I will go one step further and then I will ask the witness one more question as to the actual fact of the exact period of time. I will admit that all this does, it creates a doubt. It doesn't create a basis for a firm finding but I believe it is sufficient to cast a doubt on the accuracy of Mr. Simon's observation up to this point.

Trial Examiner: I don't know whether the point is material enough.

Mr. Grodsky: It is material enough.

Trial Examiner: It is material enough to spend all that time on it?

Mr. Grodsky: Oh, yes.

(Testimony of Eunice Ford.)

Trial Examiner: I will reserve ruling.

Q. (By Mr. Grodsky): How long have you been employed at the plant?

A. Two and a half years.

Q. And during the entire time that you were employed there until Freda was taken off that job, do you know of your own knowledge that she had that job regularly? A. Yes, she did.

Q. And—— [57]

Trial Examiner: Just a moment. There being no objection and the evidence being otherwise admissible, I will permit the witness' last answer to stand but I will sustain the objection to the question as originally presented.

Mr. Grodsky: All right.

Q. (By Mr. Grodsky): Now, after Freda was taken off that position, do you know whether an employee was assigned to that job?

A. I don't know if she was assigned to that job. I know that she was working on the job.

Q. Was there one employee who worked on that job regularly after that?

A. As far as I know, yes.

Q. Who was that employee?

A. Jo Hutchins.

Q. You are familiar with Ann Hamilton, I mean you know what she looks like?

Mr. Macomber: What is the question, please?

Mr. Grodsky: Just that she knows who Ann Hamilton is, what she looks like.

The Witness: Yes.

(Testimony of Eunice Ford.)

Q. (By Mr. Grodsky): Jo Hutchins is a bigger girl than Ann Hamilton? A. No. [58]

Q. Is she heavier?

A. I'd say about the same.

Q. About the same? A. About the same.

Q. Is Freda a bigger girl? A. Yes.

Mr. Grodsky: I have no further questions from this witness.

Cross-Examination

By Mr. Macomber:

Q. How much older is Freda Totito, if you know, than Mrs. Hamilton?

A. About 20 years.

Q. Would you judge Freda's age to be approximately 50 years of age? A. Pretty close to it.

Q. Would you say that Mrs. Hamilton is somewhere between 25 and 30 years of age?

A. Pretty close, yes.

Mr. Grodsky: Mr. Examiner, this is a gross distortion. I mean I am flanked by two beautiful women, at least, let's get it straight, I will stipulate that Ann Hamilton is under 25.

Mr. Macomber: I will stipulate 21 if you want me to.

Q. (By Mr. Macomber): How long have you known Mrs. Hamilton? A. I can't say. [59]

Q. Would you say you have known her as long as two years?

A. I don't think so. I don't think she has been employed two years.

(Testimony of Eunice Ford.)

Q. Have you worked at any time side by side with her there in the plant?

A. I don't recall unless I worked with her on the conveyor. Well, now——

Q. To refresh your recollection, you worked on the taping machine, did you not? A. Yes.

Q. And for a period of time prior to this alleged conversation with Peggy Redden, didn't Mrs. Hamilton also work on the taping machine?

A. Yes, in front of me but you asked if I worked side by side.

Q. Her machine was closely located to yours?

A. Yes, that's right.

Q. Do you recollect that on the morning that Mrs. Hamilton was put over on the conveyor line that there was an opening developed there?

A. Yes, I remember there was an opening.

Q. Do you recollect that the girl on that machine was transferred over into what they call repair or maintenance?

A. You mean taking off the conveyor?

Q. Yes, ma'am. [60] A. Yes.

Q. Do you recollect, now, that the regular girl who took care of repair and maintenance was absent or for some reason or other was not present on the morning of this conversation?

A. That's right.

Trial Examiner: Pardon me, if I may interrupt, I want to get one thing clear.

Am I to understand that these references to putting people on the conveyor, working on the con-

(Testimony of Eunice Ford.)

veyor line has reference to the operation previously described by Mr. Simon as lifting the harness off the jig and putting it on an overhead operation?

Mr. Macomber: Yes. For the sake of convenience, I'm referring, number one, to what we call the operation of the taping machine which has no particular relationship, is it not true, Miss Witness, to the conveyor belt operation?

The Witness: Yes.

Q. (By Mr. Macomber): The conveyor belt operation is a separate operation on which several girls work and that is the operation which so meticulously and laboriously was described in the record here this morning, is that correct?

A. That is correct.

Q. I have also referred in questions just asked you in reference to repair. That is a separate operation, is it not?

A. That's right. [61]

Q. Having no particular relationship to either the conveyor operation or the taping machine operation, is that right?

A. Well, when the harnesses come through, it goes down to repair.

Q. Do you know how many people work on repair, or did, on or about February 10, 1954?

A. I think just one person.

Q. Now, that one person was absent that morning, according to your recollection?

A. Yes, sir.

Q. And that is an important integral part and function of putting these things together, is that

(Testimony of Eunice Ford.)

not right, you can't go on and manufacture without the repair function? A. That's right.

Q. When that opening developed, do you not recollect that the woman who worked over on the conveyor in this, you call it the No. 1 spot, was an experienced repair woman?

A. I don't know whether she was or not.

Q. But you heard conversation to that effect, did you not?

Mr. Grodsky: I will object to that. She is not a supervisor. She doesn't know what goes on. He is inviting hearsay on that.

Q. (By Mr. Macomber): I am asking in this conversation that you had with Peggy, I am referring you just to a conversation [62] you had with Peggy. When Peggy told you some other things, did she tell you that she needed to move this experienced repair woman on the conveyor job over to the repair job because of the vacancy?

Mr. Grodsky: I object to that on the further ground there is no showing that Peggy has any control over who works at either of those jobs which are both under the supervision, I believe I pointed out, of Mrs. Greenwood.

Mr. Macomber: Here we have this strange motion, I move to strike all of the testimony here previously. I move to strike it now of this Peggy because I don't think that anything she said is binding upon the company at all. Counsel at that time vigorously contended that Peggy did have some such authority. For the purpose of cross-examina-

(Testimony of Eunice Ford.)

tion only, I am asking this lady about the same conversation that counsel is asserting objection to and what I consider to be perfectly good ground and, therefore, I at this time renew my motion to strike all the testimony of this witness that relates to any conversation that she had with this Peggy.

Trial Examiner: While ruling on the objections in the situation which the record now stands is as follows: On the basis of Mr. Grodsky's indication with respect to his contentions in regard to Peggy Redden, and his assurance that the matter would be appropriately connected up, I overruled the motion to strike and I overruled the objection [63] subject to a motion to strike, I should say, and at the present time and in the light of Mr. Grodsky's objection to the pending question or questions, I'm going to adhere to that original determination and continue to receive testimony with respect to any conversation the witness may have had with Peggy Redden subject to objection and motion to strike and I'm going to overrule Mr. Grodsky's objection on the ground that the conversation which, in its totality, may or may not be connected up, may, also, be probative or may not be probative depending upon what the record may further show as to Peggy Redden's relationship to the other operations discussed.

In other words, what he is objecting to now is the weight to be given to any statements Peggy Redden may have made about the relative capacity of these workers to do the repair operation. I con-

(Testimony of Eunice Ford.)

ceive that that objection goes not to admissibility but to materiality and weight and, therefore I'm overruling the objection.

Mr. Grodsky: Mr. Examiner, may I be heard one step further?

The record at this point does not disclose that the operation of the girl who works on repair was subject to the general control of the girls who were working with Peggy Redden as the lead girl. That was the basis of my objection.

Trial Examiner: Yes. I have that in mind, that fact. [64] Now, if the record should subsequently indicate that your contention is well taken, it may be that this entire conversation may fall into perspective as one relatively immaterial and of no probative value to anyone in the proceeding. If, however, the record indicates otherwise, I wish to have it in the record for whatever value it may have.

Q. (By Mr. Macomber): Peggy Redden worked on the taping machine only, did she not?

A. Peggy?

Q. Peggy Redden, she worked on the taping machine only?

A. Peggy insofar as I know is leadlady.

Q. She was a lead girl in the taping section?

A. In the taping section.

Q. And, likewise, she would do work, some productive work, did she not? A. That is true.

Q. I mean in her capacity as leadwoman, would you say she worked a very substantial portion of

(Testimony of Eunice Ford.)

time on jobs similar to the jobs which you were engaged in? A. Yes.

Q. Do you recall or know of a woman named Greenwood who worked over on the conveyor belt?

A. Yes, I know her.

Q. And the Redden woman did not work on the conveyor belt, [65] did she? A. No.

Q. Did the Greenwood woman work on the conveyor belt? A. Yes.

Q. Do you recollect that on the day in question when Mrs. Hamilton was moved over to the conveyor belt that the woman who worked on the conveyor belt, at least, the woman who worked on the conveyor belt and who was sent down to repair, that her place was taken by Ann Hamilton?

A. No, I don't think that is right. If I'm not mistaken, Debbie——

Q. Debbie who? A. Debbie Hobbs.

Q. Are you sure of that or merely speculating, now, as to who that individual may have been, in all fairness?

A. Let me put it this way, I remember seeing Jo Hutchins pulling harnesses. Debbie put on wires, Debbie was taken off and sent down to the repair table.

Q. Now, what had been your acquaintance with Debbie prior to that date, had you worked with her? A. You mean side by side?

Q. Yes. A. No.

Q. Do you know whether she had ever done or

(Testimony of Eunice Ford.)

had any previous experience at repair work? I believe you told us she had. [66]

A. No, I told you I didn't know for sure. I don't know for sure.

Q. Have you talked to Mrs. Hamilton about this case? A. I have never talked to her.

Q. Have you had occasion to discuss this with her at all, say, in the last three or four weeks?

A. No.

Q. To what union do you belong?

A. IAM.

Q. Have you had any discussion with anyone representing or holding themselves out as representing or purporting to represent the United Mine Workers? A. Yes.

Q. With whom?

Mr. Grodsky: I will object to that. I don't see the materiality.

Mr. Macomber: I think it is material in view of the special issue we are raising here, Mr. Examiner.

Trial Examiner: I will overrule the objection.

Q. (By Mr. Macomber): With whom have you discussed this? A. You mean this case?

Q. Yes.

A. The only person I know, he represented himself as a representative of the United Mine Workers.

Q. Who was that individual? [67]

A. A fellow named Al.

Q. And his last name is Sabatino?

(Testimony of Eunice Ford.)

A. Yes.

Q. When did he approach you on the subject of this case? A. I can't answer that.

Q. Would it have been within the last week?

A. No.

Q. Within the last month? A. No.

Q. How many times have you seen Mr. Sabatino?

A. I can't answer that, either.

Q. Where did you discuss the matter with him the first time? A. I don't remember.

Q. Do you recall whether it was at your house or at the plant or where?

A. I'm sorry, I can't remember.

Mr. Grodsky: Mr. Examiner, at this time I wish to renew my objection. My impression was that respondent's counsel was trying to tie this up in some way with the organizational effort of the United Mine Workers whereas now he is talking about the investigation of circumstances relating to this specific discharge which is an entirely different matter and I don't believe that any of the testimony of the witness on that point has any particular relevancy to anything that we are concerned with here. [68]

Trial Examiner: Well, I don't intend to have any extended discussion on the record. The fact that the witness may have discussed the instance with which we are not concerned with the representative of the United Mine Workers may have some bearing upon credibility. Whether it has any persuasive bearing of credibility is matter that will

(Testimony of Eunice Ford.)

have to bear record. Because of the relevaney in that connection, I will overrule the objection.

Q. (By Mr. Macomber): Have you filed or intend to file application for membership in the United Mine Workers?

Mr. Grodsky: Object.

Trial Examiner: The bearing of that particular matter upon credibility is relatively remote and the case raises collateral issues. For that reason while the general field of inquiry is still within competence of counsel, I will sustain this particular objection.

The Witness: Have I——

Mr. Grodsky: You don't have to answer.

Q. (By Mr. Macomber): May I ask what your intention is in this regard, do you have any present mental intention of joining the United Mine Workers?

Mr. Grodsky: Object.

Mr. Macomber: I'd like to be heard on this, if counsel please.

Trial Examiner: Very well, I will hear you. [69]

Mr. Macomber: I think that it is elementary that the bias, the prejudices, if any, the motives of a witness who appears to testify are always in very decided issue. That would be true even in the absence of the special defense that we have raised here. However, it appears in this case and it is in the record that there was some kind of factual dispute that was in progress out of which apparently the present difficulty stems. This witness has been very reluctant, obviously, to disclose any con-

(Testimony of Eunice Ford.)

versation she had. She is reluctant and unwilling to tell us where and when although she quite obviously seems to know with whom she had the discussions. I think that when I address a question to her, in view of the facts of the dispute, it is apparently existing whether she has any intention at the present time and she was very careful in the last question to put that distinction to you, Mr. Examiner, and that it has a vital bearing upon motives.

If she sits here now purporting to tell a conversation and relate facts which have a bearing upon this issue, I think the present intention to join on the part of the witness is part of the factual controversy and if it is dealing with representatives of the United Mine Workers I think it sheds light on the veracity, motives, interests, bias and it is for that reason that we are offering to propound that question. [70]

Trial Examiner: I wasn't of the opinion when the matter was raised that any contacts the witness may have had in the past with the representatives of the United Mine Workers may be relevant to credibility issues as relating to any bias that she may have. The question as to whether she may have a present intention with respect to joining the United Mine Workers if relevant and material also on the credibility issue presents somewhat a different problem. On the basis of the record as it now stands, I'm going to sustain the objection.

Q. (By Mr. Macomber): Has Mr. Sabatino

(Testimony of Eunice Ford.)

ever presented you with an application for membership into his union?

Mr. Grodsky: Object.

Trial Examiner: Sustained.

Q. (By Mr. Macomber): Have you ever signed such an application?

Mr. Grodsky: Object.

Trial Examiner: Sustained.

Q. (By Mr. Macomber): Have you ever been out socially with Sabatino?

Mr. Grodsky: Object.

Trial Examiner: I may ask, as I'd like to ask at this time in view of the nature of the testimony that the witness gave on direct examination which has bearing upon the general issue with which we are here concerned, obviously, but [71] in a manner and to a degree which is not yet apparent to me, is this extended exploration of the witness' bias in view of the limited nature of the testimony necessary? Granted that it's relevant, aren't we spending more time on it than it's worth?

Mr. Macomber: Let me put it this way, I can take a hint. I have no further questions.

Trial Examiner: Mr. Grodsky, any redirect examination?

Mr. Grodsky: No, no further questions.

Trial Examiner: Just a few questions that I wanted to ask.

Q. (By Trial Examiner): At the time Mr. Simon was on the stand describing the operations of the rotary table, he referred to the conveyor

(Testimony of Eunice Ford.)

operation or, rather, the operation that was involved in loosening the harness from the jigs, turning around and stepping approximately three steps and lifting it up to put it on the overhead conveyor.

Now, do I understand from the testimony that you have just given that there are more than one person assigned to that particular job?

A. I think two girls switched off, if I'm not mistaken.

Q. At the time with which we are concerned in February of 1954, was there more than one person at a time doing that particular job?

A. Only persons I can remember taking off harnesses is Jo [72] Hutchins and Freda Totito.

Q. Both did at the same time?

A. Oh, no. Freda worked before Jo.

Q. What I meant was at the time that Jo—let's put it this way, at the time Jo Hutchins was doing this operation was somebody next to her or a few feet down doing the same operation?

A. You mean helping her take the harnesses off?

Q. Well, now, you got me confused. I understood one person did it.

A. That's right.

Q. One person grabbed the harness and turned around, took a few steps and hung it up?

A. That's right.

Q. No other person had to assist physically?

A. That's right.

Q. Was another person doing it at the same time, were two people working at the same time?

(Testimony of Eunice Ford.)

A. Debbie, yes, right next to her, putting on wires.

Q. Working at the same job, the lifting job?

A. No, Jo did that by herself.

Q. By herself. And Freda, although she had done the same job did it before Jo was assigned there? A. That's right.

Q. At the time Jo was doing it, Jo was the only one doing it? [73] A. That's right. [74]

* * *

JAMES ARTHUR JUHL

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

* * *

Q. Please speak up, Mr. Juhl. Are you employed by Essex Wire Corporation?

A. Not at present. I am employed by Convair of San Diego.

Q. During the period ending in, say, middle February of 1954, were you employed by Essex?

A. Yes, sir.

Q. In what capacity were you employed?

A. Maintenance mechanic.

Q. Did you take any part in the activity on behalf of the United Mine Workers while you were

(Testimony of James Arthur Juhl.)

employed there? [75] A. Yes.

Q. What did you do?

A. Well, I helped pass out cards for membership in the Mine Workers.

Q. Did any supervisor talk to you about that?

A. Yes, my foreman, Clyde Casey, talked to me the second day I started passing them out.

Q. Do you know what date that was or approximately what date?

A. The early part of January. I don't know the exact date.

Q. What is the name of the foreman?

A. Clyde Casey.

Q. C-a-s-e-y? A. Yes.

Q. At the time he spoke to you was anyone else present to overhear the conversation?

A. No.

Q. Where did that conversation take place?

A. Took place right where the old maintenance shop used to be. By the air compressor right in the middle of the building. I don't know how to explain it.

Q. At what time of day did this conversation take place?

A. Right after lunch, around 1:30.

Q. What did Mr. Casey say to you and what did you say to him and will you speak up, please? It is hard for me to [76] hear you.

A. Well, anyway, I was coming near the punch press line which is right near that part of the fac-

(Testimony of James Arthur Juhl.)

tory and Casey called me over. He asked me, he says, if I was passing out membership cards for Mine Workers and I said I was. And he says, "Have you got any of them signed?"

And I said, "Yes, I do."

And he said, "What are you trying to do, make a fool out of me?"

And I said, "No," I didn't know quite what he meant. I said, "No."

He said, "Where are the cards?"

I told him I had them on me.

He said, "Don't you like your job here?"

I said, "Yes."

He said, "Well, I want the cards in my office in five minutes."

I didn't know what exactly to do. I took the cards and gave them back to the people on company time on threat of being discharged and went to the office and told him I gave them back to the people.

Then he went on to tell me—I gave the cards back to the people—and then he went on to tell me that in order for me to campaign and get another union, I first had to notify the front office of the plant and then I would have [77] to wait until the contract of the IAM expired and have to have a vote on two or more unions to see which came in and that was the end of that meeting.

Q. Did you have any further discussion with any representative of management relating to the United Mine Workers activities? A. Yes.

Q. When, now, in terms of time, when was the

(Testimony of James Arthur Juhl.)

next discussion? A. About a week later.

Q. With whom was this discussion?

A. Clyde Casey came and got me and brought me to the new maintenance department and Mr. Simon was there, standing there, and he asked me if I was campaigning on company time. And I said, "No, I wasn't campaigning on company time but I was on company property."

Well, he told me that we were causing a lot of grief, you know, while the people going up in arms against everybody and things like that and explained to me if I want to campaign to do it off the company property out of the company time. And I told him I was doing it during lunch hour and rest period and he said the rest period was company time because we were being paid by the company for rest periods.

So after that I sloughed off on the passing of cards. [78] After that we shook hands and I went back to work.

Q. By the way, did you at any time pass out any cards on behalf of the union during working time?

A. No, it was not. It was during my breaks and lunch hour.

Q. Did you at any time receive any signed cards from any employees who had signed cards during working time?

A. No, the ones I passed out at 10:00 o'clock that day, I got back at 12:00 noon.

Q. Now, did you have any further discussion

(Testimony of James Arthur Juhl.)

after the second discussion about which you have spoken with any representative of management?

A. Yes, one month later, in February, about the middle of February.

Q. Now, with whom was this discussion?

A. With Mr. Simon and Clyde Casey.

Q. And where did this third discussion take place?

A. In the maintenance department.

Q. Would you tell us what was said and who said it?

A. Mr. Simon asked me what the idea was making all the trouble for me and I asked him what trouble. And he said by passing it around that the Anaheim plant was getting higher wages.

Q. Just a minute. Please speak slower and louder.

A. O.K. He asked me what the idea was making all this trouble for me and I asked him what trouble. He said by [79] passing around that the Anaheim plant was getting higher wages per hour than we are down here and I told him I seen the contract and that is what it read.

And he said I will show you the contract I carry at your convenience. I said, "O.K."

He said, "I will let you see it."

I said, "O.K., if I am wrong I will go tell the people I'm wrong."

He went on to say—usually when I tell a person something, I don't like to be taken for a liar—he went on to tell me what the operations at the Anaheim plant were, in other words, highly skilled

(Testimony of James Arthur Juhl.)

operations and bigger machines and that is why some people are making more money at the other Essex Wire in San Diego.

Then I went on and asked him what about, you know, campaigning on company time. I said, "What about going around and trying to get retractions of the United Mine Workers on company time?"

And he told me that Goldie Riggins was allowed to go around and collect dues and process grievances on company time. And I told him the contract didn't allow to campaign on company time and he said it was sort of a gentlemen's agreement.

Q. How did the question of campaigning on company time come up in this discussion? [80]

A. Well, he went on to say that—I was speaking over there—he went on to say, "This is the second time I'm warning you about campaigning on company time and property," and he says, "If you don't stop you will not only have the IAM to fight but me to fight also and I will fight back but good."

Q. Did he indicate what he had reference to when he spoke to you about campaigning on company time and property?

Mr. Macomber: I am going to object to that as calling for a conclusion and opinion of this witness. He may answer as to the conversations he had.

Trial Examiner: I will sustain the objection.

Q. (By Mr. Grodsky): Did he say what he had in mind when he spoke about the campaigning on company time?

A. No, he didn't. He just said campaigning, you

(Testimony of James Arthur Juhl.)

know. I mean wearing buttons and stuff like that.

Trial Examiner: Are you quoting him now?

The Witness: Well, no, but I mean that covered that. He didn't say "buttons and stuff like that." He said campaigning and that was the only campaigning over there, wearing buttons and stuff.

Q. (By Mr. Grodsky): Mr. Juhl, he made reference to talk in the middle of February to your having spoken to employees about what the employees in the Anaheim plant were earning, is that correct? [81]

A. I talked to four employees outside the company property during lunch hour. I think it was the day before he talked to me and I imagine it was they practically came in and told the rest of the——

Mr. Macomber: That is hearsay. I ask it be stricken.

Trial Examiner: It will be disregarded.

Q. (By Mr. Grodsky): You spoke to four people, four employees on the date before the day that Mr. Simon spoke to you and that was during the lunch hour? A. That's right.

Q. Was that the discussion to which Mr. Simon referred when he spoke to you?

A. That is what he referred to. He said that was going around the plant, that I was trying, that I was spreading the rumor that Anaheim was getting more money than Essex Wire.

Mr. Grodsky: No further questions.

Mr. Macomber: I think it would be appropriate

(Testimony of James Arthur Juhl.)

at this time to call to your attention, Mr. Examiner, a portion of General Counsel's Exhibit No. 4 which is the current agreement in force and effect between the IAM and the company and I allude specifically to Article 3 thereof which provides in part as follows: "The Union shall be represented by committeemen or women—committeewomen in parentheses—hereinafter called committeemen who shall serve in one or [82] more departments in the plant by mutual agreement between the company and the union, total number not to exceed eight. One may be added for each 100 employees in the bargaining unit over 300." And so forth and so on.

Then next referring to the grievance procedure in Article 5, Step No. 1, "Employees must contact the committeeman who will discuss the matter with the department foreman."

I call specifically to your attention these articles but urge also the whole grievance procedure be examined.

Cross-Examination

By Mr. Macomber:

Q. And with that in mind, I will ask you now this question: Goldie Riggins was the committee-woman, was she not, for the IAM and you understood her position as such at that time?

A. Yes, sir.

Q. And it was customary and usual for employees under her jurisdiction to contact her at all

(Testimony of James Arthur Juhl.)

times during working hours if they had a problem?

A. If they had a grievance, yes.

Q. Anything in connection with the grievance or anything that fell within her jurisdiction as committeewoman, whatever that jurisdiction may have been, right?

A. As long as it had something to do with grievance.

Q. When did you go to work for Essex Wire Corporation? A. February 4, 1953. [83]

Q. And you left their employ when?

A. June 9, 1954.

Q. Are you still a member of the United Mine Workers?

Mr. Grodsky: Object.

Trial Examiner: Well, once again we come to this credibility matter. I am reluctant to be unduly restrictive in this matter of testing the witness' credibility but it seems to me, Mr. Macomber, that mere membership in the organization while it has some bearing, of course, there is comparatively little reliable light on the credibility issue.

In other words, I'm just thinking to myself if the witness answered in the affirmative, how seriously would that affect the problem? And while I can see some relevance and materiality in the credibility exploration that deals with any discussions the witness may have had with a union representative bearing upon the specific matters related in his testimony, this general exploration of the field of contacts by way of bare membership, if I may so

(Testimony of James Arthur Juhl.)

describe it, seems to me to be getting off into a sort of shadow area where the materiality of the evidence becomes very difficult to weigh.

Mr. Macomber: May I be heard briefly?

Trial Examiner: Yes.

Mr. Macomber: I don't know, of course, what the impact of such testimony may have on your mind but I would suppose [84] that if it be true and it has certainly been suggested in the evidence that it is true that there was a serious dispute developing between these two unions and that the question of membership in one union or the other might have conceivably, would to my mind have a serious, at least, it would be a factor that would weigh heavily in the matter of the credibility of the witness. If we have here, as we suggest, this organizational attempt, we consider this organizational attempt to so proceed on the part of the United Mine Workers to accomplish I know not what by this proceeding and if this man is a member of the United Mine Workers, I would suppose that even though you should choose yourself to regard it as having only a shadowy bearing on his veracity, nevertheless, would have some bearing and, therefore, would be material to that extent.

I would also urge that we have raised here as a sort of a special defense the question of the standing of the United Mine Workers at all. In proceedings of this kind and the question as to whether organizing on their behalf a so-called unauthorized union would be protected under the Act.

(Testimony of James Arthur Juhl.)

Under those circumstances, it is for that dual purpose that I respectfully request that it be considered.

Trial Examiner: With respect to the second purpose, I indicated previously when you made the statement for the record that you would be at liberty to urge it at any [85] appropriate point in the proceedings by way of motion to dismiss or any other fashion you saw fit. However, I may say by way of observation at this time that it's my understanding of the decisional doctrine on the subject that that question has already been settled contrary to the company's contention. You are, of course, urging again for consideration by the Board. On the basis of established precedence I would have to rule that the mere fact that these individuals may have been acting for a non-complying union does not disqualify them for receiving such protection as the Act may afford to persons allegedly subjected to discriminatory treatment.

With respect to the other issue, that is, the matter of membership as bearing upon credibility, in effect, my statements on the record with respect to Mrs. Ford tended to make any position in that regard clear. I foreclosed by sustaining the objection on examination as to her intentions in regard to membership or whether she had been a member and any contacts with union and with personnel and contacts directly relating to matter of testimony, that is, discussion she may have had. Those rulings were

(Testimony of James Arthur Juhl.)

based upon substantially similar considerations, that is, consideration as to whether in the event of affirmative or supposedly a discriminating answer, whether there would be sufficient doubt cast on credibility to make the point worth considering. And I was then of the opinion that membership or intention to become a [86] member, while it might have some bearing, certainly it does have some bearing on claim of interest or bias, threw so little light on the subject I could not in good conscience and performance of my functions as Trial Examiner rely upon it as a persuasive factor and consistent with my ruling, I am going to sustain the objection.

Q. (By Mr. Macomber): May I ask you, sir, if you have had occasion to discuss this matter or your testimony here given with an agent or representative of the United Mine Workers before coming here or with one whom you understood to be either a representative or agent of the United Mine Workers?

Mr. Grodsky: I will object to that question on the ground it is compound. There are at least four different questions in there.

Trial Examiner: If the witness understands, he may answer.

The Witness: Well, I didn't, all the United Mine Workers told me to do is that at any time any——

Q. (By Mr. Macomber): I just asked you

(Testimony of James Arthur Juhl.)

whether you had a conversation. That is my question at this time.

A. Not about the whole testimony, no.

Q. About any testimony you were going to give here? A. Any one part, yes.

Q. Who is the particular individual with the United Mine Workers with whom you discussed this matter? [87]

Mr. Grodsky: I will object to it, Mr. Examiner.

Trial Examiner: Overruled.

The Witness: Well, I forget what his name is. The first name is Al.

Q. (By Mr. Macomber): Was it Sabatino or some such name as that?

A. I believe it was.

Q. When did you discuss it with him?

Mr. Grodsky: Mr. Examiner, I have a standing objection to this entire line.

Trial Examiner: You have a standing objection. For the record, the objection is overruled.

The Witness: When, the exact date, I don't know but it was when he first came down from Los Angeles.

Q. (By Mr. Macomber): Was that within the last month? A. No.

Q. The last two months? A. No.

Q. Three months?

A. It was back sometime in January.

Q. Have you discussed it with him or such a representative since? A. No.

(Testimony of James Arthur Juhl.)

Q. Have you discussed this matter with either Ann Hamilton or Loraine Evans? [88]

A. Yes.

Q. Have you discussed it with them within the last week? A. No.

Q. Within the last month?

Mr. Grodsky: I will object to this, Mr. Examiner.

Trial Examiner: Overruled.

The Witness: No, I don't think since last month, back when everything was going pretty strong. There was an uprising, whenever it first started, it was back there.

Q. (By Mr. Macomber): Have you discussed this matter or the subject of your testimony with anyone except a member of the Board or someone representing the Board within the last 30 days?

A. No.

Q. Do I understand within the last 30 days until the time you came up here and testified a few moments ago you had not discussed this with anyone whomsoever, the union representative or either of the complainants as to this matter, or anyone?

A. Other than the Board?

Q. Yes. A. The last 30 days, that's right.

Q. Now, what were your working hours at the time, well, on or about the 1st of February of this year?

A. My working hours was the day shift, 8:00 until 4:30.

Q. 8:00? [89] A. Pardon, 7:30 until 4:00.

(Testimony of James Arthur Juhl.)

Q. 7:30 until 4:00. Was it 7:45 until 4:15?

A. Yes, that's right.

Trial Examiner: That is your present understanding?

The Witness: Yes. It was from 8:00 until 4:30 and was changed on account of the parking problems.

Q. (By Mr. Macomber): How much time did you have off for lunch during that time?

A. One-half hour.

Q. Pardon? A. One-half hour.

Q. So altogether, excluding your half hour lunch period, you worked eight hours, is that right?

A. That's right.

Q. And you were paid for eight hours?

A. That's right.

Q. And in addition to that, whenever it was necessary for you to go to the men's room or anything of that kind, you went, is that correct?

A. That's correct.

Q. Well, do I understand, then, that there were periods of time that you had so-called rest periods?

A. Yes.

Q. This is the period of time in which you circulated these membership cards? [90]

A. Yes. Well, that doesn't take in going to the rest room. I'm talking about the standard 10:00 o'clock break and 2:30 break.

Q. Well, you had a break at 10:30, did you, at 10:00 o'clock? A. Yes.

Q. You were paid during that break, weren't

(Testimony of James Arthur Juhl.)

you? A. That's right.

Trial Examiner: How long did the breaks last?

The Witness: Ten-minute break.

Q. (By Mr. Macomber): Now, do I understand that it was during the break that you circulated these membership cards?

A. I circulated them before, too, I mean when I come to work I punch in but that wasn't on company time.

Q. In the plant before the 8:00 o'clock bell rang?

A. That's right.

Q. Do I understand that you never at any time, not one, circulated these membership cards except during this so-called break?

A. That's right.

Q. Never discussed the subject of membership in your union with an employee except during this five or ten-minute break?

A. The only time I ever discussed—all I do is answer questions somebody asked me.

Q. Did people from time to time ask you questions?

A. Yes. [91]

Q. On company time?

A. Yes. Alice, I don't know her last name, she asked me a couple questions on company time.

Q. Did anyone else ask you questions on company time, without identifying them, were there other people who asked you questions?

A. Yes, Goldie Riggins showed me some form on company time.

Q. When these folks asked you about your union

(Testimony of James Arthur Juhl.)

or direct such questions as they did, would you undertake to answer their questions?

A. In the briefest possible way, yes.

Q. And how long had that been going on, that is, the subject of your asking questions and them asking questions of you and your answering them prior to February 10, 1954?

A. Oh, well, from the time I started passing those cards out.

Q. When did you start passing them to the employees initially?

A. First part of January, maybe, well, first part of January.

Q. Well, it was sometime after the middle of January, was it, that someone spoke to you first about the passing out of those cards?

A. No, it was about how many we had, how many people there were and that sort of stuff.

Q. As I understand, Casey was the first one to speak to you [92] about membership cards?

A. Yes.

Q. And at the time Casey spoke to you, you told us that in the first conversation, I believe, that a Mr. Baker was also present?

Mr. Grodsky: I object to this, Mr. Examiner. That is contrary to the testimony of the witness.

Q. (By Mr. Macomber): Was a Mr. Baker present? A. In the first conversation?

Q. In the first conversation that you had?

A. There was nobody within hearing distance except me and Mr. Casey.

(Testimony of James Arthur Juhl.)

Q. Now, the second conversation, I believe, you told Mr. Simon was there, and Mr. Casey was there, is that right? A. Yes.

Q. Now, was Mr. Baker there on that occasion?

A. Mr. Baker, is he Lee Baker? He walked up there for five minutes and walked back but I don't think he heard anything that was of importance.

Q. He was there, anyway?

A. He was there for about five or six minutes.

Q. On the third conversation that you told us about, do you recollect whether Mr. Baker was present? A. No.

Q. Do you recollect on the second occasion when you say Mr. [93] Simon was there, do you remember Mr. Simon saying, "Come on over here, Mr. Baker, come over somebody else and come over here, Casey, I want everybody to hear this"?

Do you remember him making any statement like that? A. No.

Q. Do you remember him saying to you he didn't care what you did in the way of carrying on your membership campaign as long as you didn't do it on company time and just stop right there, do you remember him making such a statement to you as that? A. Yes, and property.

Q. Company time and company property, is that what he said to you? A. That's right.

Q. When you said something to him about this break, did you say something at that time?

A. Yes, I told him I was passing out and taking them on breaks, lunch and before work.

(Testimony of James Arthur Juhl.)

Q. He told you, did he, that that was company time or regarded as company time?

A. That's right. After that I stopped.

Q. All right. You mean to say after Mr. Simon spoke to you you never thereafter circulated any membership cards at all?

A. I circulated but it wasn't during breaks. [94]

Q. When did you circulate them?

A. Lunch, before work.

* * *

Q. (By Mr. Macomber): You indicated that you were a maintenance man, is that right?

A. That's right.

Q. That is while you were at Essex Wire Corporation? A. Yes.

Q. And as such you circulated about the plant, did you not? A. That's right.

Q. And sort of from department to department and employee to employee?

A. Well, put it from department to department and machine to machine. [95]

* * *

Q. When Mr. Simon spoke to you on the first occasion, was his manner and tone of voice one of courtesy? A. Oh, yes. He talked nice to me.

Q. He didn't shout at you or anything of that kind?

A. No, sir, he didn't. We shook hands after that.

Q. There wasn't any anger? [96]

(Testimony of James Arthur Juhl.)

A. There wasn't any hard feelings. We shook hands.

Q. You had always gotten along with Mr. Simon prior to that day?

A. I enjoyed working with him.

Q. And found him very pleasant, is that right?

A. That's right.

Mr. Macomber: That is all.

Mr. Grodsky: Mr. Examiner——

Trial Examiner: Just a minute.

Mr. Grodsky: Well, I have something which I inadvertently overlooked and I want to ask the witness something new. I thought I might do that before.

Redirect Examination

By Mr. Grodsky:

Q. I show you General Counsel's 2 in evidence which is a notice that had been posted on the bulletin board and ask you if you saw a notice posted on the bulletin board concerning union campaigning?

A. Yes, I seen that notice on the bulletin board.

Q. Is this notice which I hand you the same as the notice which you saw posted on the bulletin board?

A. The signature isn't quite the same. I believe it was Tom McCall or something like that. I don't know his position there.

Q. Tom Walton? A. Walton, yes. [97]

Q. Now, I will ask you to look at the second

(Testimony of James Arthur Juhl.)

paragraph in this General Counsel's 2 and ask you if that is the same, if that appears to you to be the same?

A. It sounds the same. It has the same, I don't know exactly, I couldn't say for sure whether it was the same or wasn't.

Q. The first paragraph of that you are sure is the same? A. Yes.

Q. The second, you are not sure of one way or the other?

A. I don't know, I couldn't say.

Q. Do you remember whether or not the one you saw there had any specific reference to company property?

Mr. Macomber: I'm going to object to that, as leading and suggestive.

Mr. Grodsky: The question is whether or not. I'm not suggesting either way.

Mr. Macomber: I suggest you can't avoid the rule by appending whether or not and then asking a perfectly leading question.

Trial Examiner: Just a minute. I'd like to give some study to General Counsel's 2.

I will sustain the objection.

Q. (By Mr. Grodsky): Do you have any present recollection, Mr. Juhl, of anything that you recall that was in the notice that you don't see in that notice? [98] A. No, I don't.

Q. Now, you testified on cross-examination that Goldie Riggins at one time during working hours showed you some form? A. Yes.

(Testimony of James Arthur Juhl.)

Q. What was the nature of that form, what was it about?

A. Well, the form was on another plant that the IAM, what she thought had taken over from the Mine Workers in the plant and they had a vote in the plant and the IAM was the raiding union and the Mine Workers carried the contract of that plant. But, anyway, well, quite a few different unions all got in together, all AFL, and said, "Look, the Mine Workers haven't got any votes."

Well, the non-voting employees who put "No" down actually were for the Mine Workers.

Q. She showed you the tally of the ballots of the other election?

A. That's right. And I told her what it meant so she wouldn't tell the people, you know, a lot of bunk. So she went to her union and told her union about it and then they straightened her out.

Mr. Grodsky: I have no further questions.

Recross-Examination

By Mr. Macomber: [99]

* * *

Q. With reference to General Counsel's Exhibit No. 2, when did you say you left the plant, left the employment of the plant? A. June 8th.

Q. Was there such a bulletin as this bulletin on the board at that time or had it been removed prior thereto, if you know?

(Testimony of James Arthur Juhl.)

A. I believe it was removed.

Q. Do you recall when it was removed?

A. No.

Q. Do you recall ever seeing this bulletin except up on the bulletin board?

A. Right near the timeclock in the glass enclosed place.

Q. How frequently did you see it?

A. Well, I read it when it was first put up and after that I didn't pay too much attention to it.

* * *

Q. Would you say it was put up on the bulletin board on the 14th of January, 1954, as would be indicated on the face [100] of the bulletin?

A. Yes.

Q. Then you are not prepared to say, are you, that the original notice posted on the bulletin board contained any language different than what appears here?

A. No, it's about the same. I know the top paragraph, I know it is just the same as the top paragraph.

Q. This looks like the notice?

A. Yes, but the reason, Tom, I notice his name, I was wondering what authority he carried there.

Q. You are not prepared to say under oath, are you, that the notice that was posted on January 14, 1954, was any different than the notice we have here?

A. I wouldn't say it was different. I know the

(Testimony of James Arthur Juhl.)

top was but the bottom don't register.

Q. In other words, you are not sure?

A. I'm not sure about whether or not the signature of the original notice is the signature of Simon or the signature of the other man. The signature on that one was put in ink.

Q. Well, did Mr. Simon's name appear, according to your recollection, on the original bulletin anywhere, or don't you have a recollection?

A. Yes, I do. I believe it was up on top, Tom, or whatever his name was.

Q. And you think somebody signed below Mr. Simon, is that [101] right? A. Yes.

Q. Prior to the issuance of that particular bulletin, you had been advised through company rules and otherwise that campaigning for union purposes during working hours was not permitted, were you not? A. Yes, so advised.

Mr. Macomber: That is all.

Q. (By Trial Examiner): Mr. Juhl, when you were asked to specify your working hours and you indicated that you worked between 7:45 and 4:15, let me ask this, were those the hours, the actual working hours that were in effect in January and February?

A. Yes, I believe they just changed working hours. We were working from 8:00 o'clock until 4:30 but there was too much traffic.

Q. Do you remember when that was changed?

A. No, I don't.

Q. Well, with relation to this time, having in

(Testimony of James Arthur Juhl.)

mind the date early in January when you began passing out cards and the dates of these conversations with Mr. Casey and Mr. Simon, was the change in working hours accomplished at any time during that interval or before that or after?

A. It was before all this union trouble started.

Q. Before all the union trouble started? [102]

A. Just right, maybe, at the beginning of the union trouble, at the beginning or a little before.

Q. So that the shift from 8:00 o'clock starting time to 7:45 a.m. starting time would have occurred as you now recall it sometime early in January?

A. Early in January or late in December.

Q. Very well. When you spoke in your testimony of an 8:00 o'clock starting bell, was that 8:00 o'clock starting bell a starting bell for the purpose of getting production going after this change in hours or before?

A. It was before that change.

Q. After the change when your hours were according to your testimony 7:45 to 4:15, when did the starting bell ring?

A. The starting bell rang at three minutes, let me see, 7:43.

Q. In other words, your reference to the 8:00 o'clock starting bell was reference to the situation that existed before our holiday problem arose?

A. Yes.

Q. Very well. Now, having that in mind, what is your present recollection with respect to any union activity you may have engaged in in January and

(Testimony of James Arthur Juhl.)

February when, in relation to the starting bell, you passed out cards before work?

A. Well, at the start of work. Well, I passed out cards [103] before the bell rang—before the working bell.

Q. If the bell rang at 7:43, your testimony is you passed out cards on those occasions only before 7:43?

A. Yes, I was so used to the starting bell at 8:00 o'clock. That is the only time, before the bell rang. Then when it rang at 10:00 o'clock and during the lunch hour, then the 2:30 break and then after work. If I was talking to somebody outside the gate and driving somebody some place, I would talk to them about it.

Q. When was your lunch hour?

A. 12:00 noon.

Q. Until 12:30? A. Yes.

Q. A uniform lunch hour for everyone in the plant? A. Yes. [104]

* * *

JAMES C. HAMILTON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. Will you please state your name and address?

A. James C. Hamilton, 269 San Jacinto, San Diego.

Q. Are you employed by Essex Wire Corporation?
A. Yes, I am.

Q. In what capacity?
A. Packer.

Q. How long have you been working for that company?
A. Fourteen or fifteen months.

Q. Did you engage in activity on behalf of the United Mine Workers?
A. I did.

Q. And do you recall the date when you—
strike that.

You were, did you wear a button on behalf of the United Mine Workers?
A. I did.

* * *

Q. (By Mr. Grodsky): Do you recall the date when you first [110] started to wear a union button?
A. February 8.

Q. Of 1954?
A. This year, '54.

Q. Did any employees of Essex Wire wear buttons before that date?

A. Yes, they did. I think they wore the IAM buttons which was passed out two or three days

(Testimony of James C. Hamilton.)

before we ever put the Mine Workers' button on.

Q. Did you see employees of the IAM wearing buttons at any time before, say, a week before you put on your buttons? A. I did.

Q. When was the first time you saw them wearing those buttons?

A. Well, like I stated, the first time that I seen it was three to four, maybe a little longer, that week, and then the following week is when we put ours on. It was on a Monday morning that they had already had their buttons on.

Q. Mr. Hamilton, I want to make myself clear. You put your buttons on on February 8th?

A. Yes.

Q. The Monday before that would be February 1? A. Yes.

Q. Now, do I understand you correctly that the IAM people put on their buttons during the week of February 1? [111]

A. I will say they did, yes, sir.

Q. Were they wearing buttons before February 1?

A. As I recall, I won't say for sure, but I don't believe so.

Q. Did you observe where they got their buttons from? A. Yes, I did.

Q. Whom did you see distributing buttons?

A. Mr. Sienco, IAM representative.

Q. Mr. Sienco? A. Sienco, S-i-e-n-c-o.

Q. Is he an employee of the company?

A. No, he's an IAM representative.

(Testimony of James C. Hamilton.)

Q. When you saw him distributing buttons, was he in the plant? A. He was in the plant.

Q. What part of the plant?

A. Over by the tapers.

Q. And was it during, well, what time of the day was it?

A. I'd say between 2:30 and 3:00 o'clock.

Q. Well, there's a break, a ten-minute break at 2:30, isn't there? A. Yes, there is.

Q. Was it during that break he was distributing the buttons? A. No, it wasn't.

Q. It was after the break period was over? [112] A. Yes, it was.

* * *

Q. (By Mr. Grodsky): Did anyone talk to you about the Mine Workers' button that you were wearing, any representative of management, I'm talking about?

Mr. Macomber: I will object to the form of that question. Well, if it's a preliminary question, I will withdraw my objection.

Trial Examiner: Very well.

The Witness: Yes.

Q. (By Mr. Grodsky): Who was it that spoke to you about it? A. Mr. Simon.

Q. When, what day did he speak to you about it? A. February 8.

Q. Is that the first day on which you put on the button? A. First day.

(Testimony of James C. Hamilton.)

Q. What time of the day did he speak to you about it?

A. Right after the 10:00 o'clock break. [113]

Q. Where?

A. In my foreman's office, in the shipping-receiving office.

Q. Was anyone else present?

A. Yes, there was.

Q. Who? A. Goldie Riggins.

Q. She is the same Goldie Riggins who has been identified here as an IAM committeewoman?

A. Yes, sir.

Q. Well, will you tell us who said what in that conversation?

A. Well, the reason that——

* * *

The Witness: I went to work on February 8th. I got there at 7:00 o'clock and about 7:25 I left from the coffee [114] table and went back to the side I used to work, on the taillights. So I was sitting there talking to this Irene, I don't know her last name but the leadlady on that side. Me and her was sitting there talking and I was asking her why she didn't speak any more and if she didn't speak I was going to tell her husband, just talking back and forth.

This Jean, I don't know her last name that works down there, she came in and came right on the other side of me and stopped and made a statement so that I could hear.

(Testimony of James C. Hamilton.)

Mr. Macomber: I am going to object.

Mr. Grodsky: This is all preliminary.

Mr. Macomber: All right, go ahead.

The Witness: She said——

Mr. Macomber: I'm going to object to this as hearsay. I don't know what he is going to come out with.

Trial Examiner: If it has any hearsay aspects, it will be disregarded in my evaluation of the record.

The Witness: Well, she said why didn't I get back on the other side of the plant, that they didn't want me on this side they work on.

And so I didn't say nothing to her. I kept talking to Irene and she said if I didn't like the union that was in here—now, she used a word in there—why didn't I get out. And so then I turned around to her and I said, "Listen, Jean, I'm not talking to you but I'll tell you this now, if [115] you start on me, then I start on you whether in the plant or outside this plant."

So then the bell rung for us to go to work. At the 10:00 o'clock break, Goldie Riggins, committee-woman for the IAM, came up and told me——

Mr. Macomber: I am going to suggest it be understood the same objection applies to anything Goldie Riggins said on the ground of hearsay.

Trial Examiner: Well, I assume that the witness—I won't assume anything, but I will make the statement that if anything is testified to by the witness with respect to any statements that Goldie

(Testimony of James C. Hamilton.)

Riggins is offered for the truth of matter allegedly asserted by Goldie Riggins, it would, therefore, be hearsay and disregarded as hearsay.

If the statement which the witness is about to attribute to Goldie Riggins is offered for non-hearsay purpose, it will be received for non-hearsay purpose. Go ahead.

The Witness: She came up to me on the 10:00 o'clock break and told me that Jean was going to file a grievance against me for threatening to slap her which I told Goldie exactly what I had said.

She said she was going to see Mr. Simon and I said, "Well, I will go with you."

We went into my foreman's office there where he was [116] waiting for Mr. Simon and so he came down and Goldie told Mr. Simon and said, "Mr. Simon, I have a complaint to turn in to you against Hamilton here."

So Mr. Simon asked her what it was. And so she told him and I told Mr. Simon exactly what I had said to her and then Mr. Simon told me, he said, "If Jean filed a grievance against you and can get a witness stating that you made the statement that you was going to slap her, then, I would have to fire you."

Then I told Mr. Simon again exactly what I said to Jean and I said, "You know yourself if they get the IAM people to get a grievance against me they can get a witness to state that I stated I would slap her on account I'm active for the Mine Workers."

(Testimony of James C. Hamilton.)

Then the conversation went on and I told Mr. Simon that I was not campaigning on the company's time or company's property for the [117] Mine Workers.

* * *

He said, "I pay you for the break and that is my time," and he said, "I'm giving you this warning now so you can take it."

And he said, "I want you to get back in your station and stay there."

So that was the first time Mr. Simon said anything to me about this union. So I went on back to my station, my work.

* * *

Q. Did you put that button back on again at some other date? A. I did.

Q. When, how long after that Monday did you put your button on? [118] A. February 10.

Q. And what day of the week was that, do you recall? A. Wednesday.

Q. Now, on that day, do you recall that your wife, Ann, left the plant that day?

A. Yes, I do.

Q. Now, did you see her—strike that.

Do you know what time she left the plant?

A. Yes, I do.

Q. Did you see her at that time?

A. Yes, I did.

Q. Now, will you tell us the circumstances under which you happened to see her at that time and if

(Testimony of James C. Hamilton.)

there was any conversation involved, will you tell us with whom there was a conversation?

A. Well, at 10:00 o'clock the bell rung that morning at 10:00 o'clock. And so my wife, and she was coming out and I was coming down from my station to where she was at and she was there with this Mel, her foreman.

Q. Mel Kresin? A. Mel Kresin.

Q. She was standing talking to her foreman, in other words, as you came up?

A. As I came up from my station.

Q. What did you hear in the conversation? [119]

A. I heard Ann ask Mel, she said, "Mel, can I go home?"

And Mel asked her, he said, "What's wrong, are you sick, have you been in to see the nurse?"

And Ann told him, she said, "What's wrong with me a nurse can't help me."

And so then Mel told her, "Well, I hate to see you go home."

She said, "Well, how about a slip?"

He said, "You go ahead, I will fill the slip out and then turn it, I will turn it into the nurse."

And so I gave Ann the house key and I told her that I would get her things for her. So I gave her the key and went on and I guess it was a minute or two before the nurse came up and Mel was still standing there.

Q. After your wife left, did you and Mel have a conversation before the nurse came up?

A. Yes.

(Testimony of James C. Hamilton.)

Q. What was said, who said what in that conversation?

A. Well, I asked Mel, I said, "Mel, what is going on?"

I said, "Why are they still picking on Ann?"

And he said, "I didn't know they were picking on her."

I said, "They are. Every time they get ready for another job on the tapers they come and get Ann when they got other girls over there working."

And he said, "Well, we can't show no partiality here." [120]

I said, "Yes, I realize that but it looks like they are picking on Ann."

So he said, "I have nothing to do with that."

So then that is when this nurse came up, she came up and said, "Mel, did you give Ann permission to go home?"

And he said, "I did, I told her to go on home and I'd fill out the statement for her and turn it in to you."

She said, "I just wanted to know."

She turned around, went back up to the office and Mel still stayed there. I guess it was about a minute after she left that we were still there talking.

Q. What did you say to him and what did he say to you?

A. He told me that Peggy, the leadlady, Peggy Redden, I believe her last name is, told him they needed another girl on the big conveyor.

(Testimony of James C. Hamilton.)

Mr. Macomber: Who is this, who are you quoting now?

The Witness: Peggy came up to her foreman which is Mel Kresin and told him—that was in the morning—that they needed another girl on the big conveyor and Mel told her to get one of the girls off the tapers and so Peggy——

Q. (By Mr. Grodsky): Is this what he told you now? I'm only interested in what Mr. Kresin said to you and what you said to him.

A. What he said to me. He told me he told Peggy to get another girl and put her on there. And I said, "Mel, it's [121] awful funny they go right straight to Ann every time they want another girl to go on a different job," and I said, "She didn't know nothing about that job and she puts out twice as much work as just about any girl on that taper that you got."

And he said, "I know that. Ann likes her work and takes an interest in it. She's interested in it."

And I said, "Well, why didn't you leave her on there?"

And he said, "Well, that, I have nothing to do with. Peggy needed a new girl so I told her to get one."

And so then I left and went back to my station and I was finishing getting an order for Marlin which is a shipper in our department. He handles all orders and I said to him to get a partial order I had to have.

Q. Did you return to work before the end of

(Testimony of James C. Hamilton.)

that break? A. I did.

Q. Did you have occasion to notice your wife's hands at the time you gave her the key?

A. Yes, when I gave her the keys, on the top of her hands was scratched, they was cut and they was also bleeding when I handed her the keys.

Q. Was Mr. Kresin standing right there at the same time? A. He was.

Q. Did you have any further conversation relating to your union activity after the time that you have already spoken [122] about?

A. Will you repeat that, please?

Q. Well, I will rephrase it. Did you have any other discussion about your union activity after this incident? A. Yes.

Q. When did you have such conversation?

A. Well, I guess that was about 10:30 or 25 minutes to 11:00.

Q. Was it on the same day, in other words?

A. Same day.

Q. With whom did you have this conversation?

A. Mr. Simon.

Q. Where did this conversation take place?

A. By the coffee tables.

Q. Was anyone else present?

A. No, sir, not at the time.

Q. Will you tell us what happened, what Mr. Simon said, what you said, and so forth?

A. I came out of the men's rest room and I had started back to my station and so I was on the other side of the coffee table when Mr. Simon and this

(Testimony of James C. Hamilton.)

other supervisor, Harms, was coming down the aisle. So Mr. Simon, he seen me and hollered at me and an ugly word was used in there, I won't repeat, and he said, "Jimmie."

I said, "Yes, sir." [123]

And he said, "Come here."

So I walked over to him. He said, "Just what are you doing over here now?"

And I told him I had just come back from the rest room.

He said, "Didn't you just get a ten minute break?"

And I said, "Yes, sir, but I worked through part of my rest period."

And he said, "You mean to tell me you have to go this early after the break again?"

And I told him that I hadn't went yet. I repeated I had worked part of my rest period getting my order out.

And when I told him that, he said, "I still see you have on this badge, you are still wearing it."

I said, "Yes, sir, I still got the badge on."

He said, "I thought I told you one time to take it off."

I repeated to him, "You did."

He said, "Well, I'm telling you again to take it off."

I said, "Mr. Simon, I'm not going to take my badge off. If the other people in here can wear IAM buttons, I don't see why I can't wear a button of the Mine Workers."

(Testimony of James C. Hamilton.)

And he said, "Well, that is the union that represents them."

And I told him, "This is the union that I believe in."

He said, he came up and said that if I like my job and [124] I didn't repeat him, I didn't say nothing the first time.

He asked me, he asked me again, "I asked you, did you like your job?"

I said, "Mr. Simon, if you want to fire me, you better have a good reason because when you do, I'm going to file charges."

And he said, "I don't care what you do and as far as any union getting in here, I don't care what union gets in here, whatever union gets in here, I'm going to run this plant just the way I want to."

And he said, "As far as that goes, I can close this plant down any day and send the work up to Anaheim because they can do it, they can put it out."

And I said, "I realize that you're in a position to do it."

And he said, "You know you caused me a lot of trouble."

And I said, "I didn't know I was causing you that much trouble."

And he said, "Well, you are."

He said, "I'm going to tell you again, I want no more trouble out of you. I want you to get back in your station and I want you to stay there."

So then I told Mr. Simon then, I said, "Mr. Simon, when I have to go to the bathroom, I'm

(Testimony of James C. Hamilton.)

going to the bathroom. I'm not going to stand around there and hold it for nobody." [125]

And he said, "Are you telling me what you are going to do?"

And I said, "You are telling me what I can do and what I can't do."

That is when he said, "You quit hollering at me."

I said, "Well, you are hollering at me, aren't you?"

He said, "You get back in your station and I don't want to see you back around here so early after the break."

And so then when he walked off, it was a couple words spoke, I don't remember exactly what it was. I went back to my station again.

Q. Now, after you had taken off your button on the 8th of February and before you put it on on the 10th, did you have any conversation or did you consult with anybody about your rights to wear a union button? A. Yes, I did.

Q. With whom did you talk about that?

A. With Sabatino.

Q. What were you told?

Mr. Macomber: I object to that as irrelevant, incompetent, immaterial, calling for hearsay. Sabatino is the union Mine Workers' representative as I understand it.

Trial Examiner: Objection overruled.

The Witness: Mr. Sabatino told us that as long as we was not getting no cards or campaigning on company time that [126] we could wear our badge any time that we wanted to and it was, nobody could

(Testimony of James C. Hamilton.)

make us pull them off and so I told him, I said, "That is all I wanted to know."

Mr. Grodsky: I have no further questions.

Cross-Examination

By Mr. Macomber:

Q. You stated that in this conversation that you had with this man named Mel at that time that your wife made her exit from the plant that you said something like this to Mel, you said, "It's awful funny that you put her on this job that she didn't know anything about."

Is that right, is that what you said to Mel about that job? A. That's right.

Q. You are this woman's husband, aren't you

A. That's right.

Q. As a matter of fact, she worked on that job, did she not, prior to December 15, 1953?

A. Worked on which job?

Q. That job on the rotary conveyor, worked right on the selfsame job that she was working on the day that she discontinued her employment?

A. She was working on the job that morning.

Q. I'm not talking about that morning. I'm asking you whether it isn't true——

A. You mean before? [127]

Q. Wait until I finish. Prior to December 15, 1953, for some period of time she had worked on that rotary conveyor and was familiar with that job?

(Testimony of James C. Hamilton.)

Mr. Grodsky: I will object, Mr. Examiner.

The Witness: It is not plain to me.

Mr. Grodsky: I object to it. The testimony disclosed there was at least three different types of operations on the rotary conveyor and I would like to have the question directed to a specific operation. There is no job on the rotary conveyor. There is the job of putting the wire on and there is another job of——

Mr. Macomber: We know about that. I'm asking about the selfsame job she was working on this day that she discontinued her employment on February 10. Hadn't she worked on that same job that same operation for some period of time prior to December 15, 1953?

The Witness: Do you mean before that she was put on there?

Q. (By Mr. Macomber): Yes, sir, before.

A. No, she worked on the taper, on that conveyor as a taper.

Q. Let me get this straight, then. If I understand you correctly, she had not worked on the conveyor belt work at any time prior to December 15, 1953?

A. She had——

Mr. Grodsky: I will object. [128]

Trial Examiner: Just a moment. I will sustain the objection as to the form of the question in the light of the testimony up to this point with respect to the operations performed on the rotary conveyor cable and the witness' last answer.

Q. (By Mr. Macomber): Let me ask you this

(Testimony of James C. Hamilton.)

question, I will ask you generally whether she had worked on the conveyor belt. I will get to the particular job. We got to take this step by step, apparently, with this witness.

Had she, prior to December 15, 1953, worked on the rotary conveyor at all? A. Yes.

Q. All right. For how long did she work on the rotary conveyor doing any one of the numerous jobs whether different or not, do you know?

A. I couldn't tell you exactly how long.

Q. I don't want you to tell me exactly. If you can't tell exactly, can you give some reasonable estimate?

A. Until they got ready to take her off again.

Q. Had she worked there a month?

A. I would say maybe.

Q. Now, had she at any time prior to December 15, 1953, worked the same job, that is the same operation on the rotary conveyor that she was working on on February 10, 1954?

Mr. Grodsky: I will object to that question, Mr. [129] Examiner, on the ground the testimony discloses three rotary conveyors. If he means specifically the big rotary conveyor, I have no objection. But in view of the ambiguity that there are three conveyors of three different sizes, I think that the question ought to be clarified.

Trial Examiner: I will sustain the objection.

Mr. Macomber: I don't know how I can make that clearer.

Q. (By Mr. Macomber): Did she work on the

(Testimony of James C. Hamilton.)

same, whether three or four of them, did she work on the same one of the three, on the same job of the three prior to December 15, 1953, that she was working on the day of February 10, 1954?

A. Well, I will answer that this way, I will say no.

Q. You say no?

A. I say the only thing she did was taping.

Q. The only thing she did on the rotary conveyor prior to that date was taping, is that right?

A. Yes.

Mr. Grodsky: Counsel, we are talking about the big conveyor?

Mr. Macomber: That's what I'm talking about.

Trial Examiner: Do you so understand?

The Witness: Yes, sir.

Q. (By Mr. Macomber): Now, how do you designate the particular operation that she was engaged on in connection with this rotary taper on February 10? [130]

Mr. Grodsky: I will object to that, Mr. Examiner. We have had trouble in describing this job. We have had the man who was in charge of the plant and he didn't give us any specific designation for that work operation. How would this witness be able to describe it?

Mr. Macomber: He might be able to describe it. If he has got in mind some idea, if he can describe it, let him describe it. If he can't, let him say he can't.

Trial Examiner: As I understand the testimony

(Testimony of James C. Hamilton.)

up to this point, from all I can gather from the work on the rotary conveyor table, it involves three distinct types of work. One, the insertion of wires on a jig, two, the application of a plastic coating to the wires on the jig, three, the lifting of the completed harness from the jig and its placement on the overhead conveyor belt.

Mr. Grodsky: Correct.

Trial Examiner: Now, if there was a conventional designation used in the plant to describe those particular operations and the witness knows it, I think we may have it. Go ahead.

Would you read the question back, please?

(The following question was read: "Q. Now, how do you designate the particular operation that she was engaged on in connection with this rotary taper on February 10?")

The Witness: Take harnesses off the big conveyor. [131]

Q. (By Mr. Macomber): Now, my question, had she ever done that before, to your knowledge?

A. To my knowledge, no.

Q. Have you had any discussion with your wife at all relative to this situation prior to the time she left the rotary conveyor table on February 10, that is, on the morning within an hour, say, before she left the rotary conveyor, did you talk to her about leaving?

A. Did I talk to my wife about leaving?

Q. Yes, sir.

A. No.

(Testimony of James C. Hamilton.)

Q. You had no discussions with her at all prior to that? A. No.

Q. Where is your job, or where was it on February 10 with relation to her job?

A. Well, I sealed boxes up.

Q. Well, how far was your job located from hers?

A. I'd say about, well, I was right close to the end of the overhead conveyor which I'd say is 180 feet from where she was at.

Q. Did you know when she went on the rotary conveyor that morning, or when she was transferred to the job?

A. I seen when they came and got her and took her down there.

Q. I see. Now, you told us that you saw a man named Sienco passing out buttons at some time other than a break [132] period. Can you tell me approximately when that was?

A. At the break period between 2:30 and 3:00 o'clock.

Q. When with relation to February 10, 1954?

A. Was he passing them out on February 10?

Q. When did you see him with relation to February 10, 1954?

A. When he first started passing out buttons.

Q. Would that have been in January, would it have been in February?

A. Around February 1, I guess.

Q. He is the business agent for the IAM, you recognized him as such, did you not?

(Testimony of James C. Hamilton.)

A. That's right.

Q. He was not an employee or foreman or in any way connected with the Essex Wire Corporation so far as you know? A. As far as I know, no.

Q. How long did you see him about the plant on that occasion?

A. Well, in fact, he was there until the time we got off from work.

Q. You told us that on one occasion you were closeted with Mr. Simon and, I believe, someone else here and Mr. Simon told you that if a witness was obtained to substantiate Goldie Riggins that he might have to let you go, is that right?

A. That's right.

Q. As a matter of fact, no grievance was thereafter filed [133] against you, was there?

A. No, it wasn't filed.

Q. And so far as you know, no complaint was filed at that time? A. No, sir.

Q. Or at any time? A. No, sir.

Q. Isn't that right?

A. Except that one morning when she took me in the office.

Q. That was the only complaint that was made and was made to Mr. Simon. Now, as I understand it, the first conversation you had with Simon, Mr. Simon, was preceded by some discussion that you had with Goldie Riggins, regarding Jean, is that right? A. Yes, sir.

Q. And Goldie Riggins had told you that Jean

(Testimony of James C. Hamilton.)

had told her that you threatened to strike Jean, is that right? A. Yes, sir.

Q. And it was following that accusation that you and Goldie all went into Mr. Simon's office, is that correct?

A. It wasn't in his office. It was in my foreman's office.

Q. In your foreman's office? A. Yes.

Q. Who was present, if anyone, besides yourself, Goldie and Mr. Simon? [134] A. That is all.

Q. Just the three of you?

A. Just the three of us.

Q. And that was the time that Mr. Simon told you that if Jean could get a witness to corroborate that you had threatened to slap her that he would have to fire you? A. That's right.

Q. Can you tell us what further conversation you had with Mr. Simon on that particular occasion.

A. Well, now, I believe on one occasion in there when Mr. Simon was talking, he said, "You put yourself in my place and you had 100 girls working for you and if they didn't want to work around one party and all sat down to strike until that one party was out," he said, "if you was in my place, what would you do?"

Q. What did you say in response to that?

A. I told him I guess I would have to do about the same thing that he would have to do.

Q. Did you have any further conversation with him at that time?

(Testimony of James C. Hamilton.)

A. We talked on but I don't remember what else.

Q. Did he tell you something like this that he wanted to keep peace in his plant and it would be all right for you to wear a button so long as you didn't campaign on company time? [135]

A. About the button deal, I don't remember.

Q. Mr. Simon did not tell you that you couldn't under any circumstances wear a button, did he?

A. He told me as long as I was in that plant, but about the button, he told me to take that button off so I took the button off.

Q. You took it off in his presence but thereafter put it on? A. Yes, on the 10th.

Q. That is, you went back and put it on and wore it, did you not? A. Yes, sir.

Mr. Grodsky: I will object to that, Mr. Examiner. The witness didn't understand the question as meaning on the same day.

Trial Examiner: I think the record will so show. If it needs to be explored you may do so.

Mr. Grodsky: May I get the witness' last answer?

(The answer was read.)

Q. (By Mr. Macomber): Let me ask you this question then: I'm addressing my questions to this conversation that you had with Mr. Simon in the presence of Goldie in the foreman's office. When was that with relation to February 10?

A. That was before February 10.

(Testimony of James C. Hamilton.)

Q. How much before February 10? [136]

A. That was on the 8th.

Q. That would have been two days before then?

A. That's right.

Q. Did you work on the 9th?

A. Work on the 9th?

Q. Yes, sir. A. Yes, I worked on the 9th.

Q. Did you wear your badge on the 9th?

A. No, I didn't wear it.

Q. Did you see any other badges being worn on the 9th? A. Yes.

Q. What badges did you see worn on the 9th?

A. I seen the IAM's and, also, the UMWA.

Q. Both badges worn on the 9th all through the day, is that right?

A. Not all through the day, just on occasions they put the UMWA badge on and then they would take them off. They would put them on and take them off and just back and forth with the Mine Workers' button.

Q. Why didn't you put your button on on the 9th?

A. Because I had had orders to take my badge off and leave it off.

Q. You put it on on the 10th, didn't you?

A. That's right. I checked with Mr. Sabatino that night and he said it was all right if I wore my badge, that they [137] could not fire me for it. So the next morning I went in and had my badge on.

Q. Now, on the morning that your wife terminated, at approximately what time was it that you

(Testimony of James C. Hamilton.)

saw her with Mel Kresin? A. What time?

Q. At approximately what time?

A. At the break period, 10:00 o'clock break period.

Q. Where was she with relation to the rotary conveyor upon which she had been working, if you know?

A. I'd say about as far as from here to the chair which I say is about 10, 15 feet.

Q. And who was present, if anyone, besides Mel, your wife and yourself? A. That is all.

Q. That's right.

A. The three of us standing there.

Q. Now at that time do I understand that there was some discussion about your wife going to see the nurse? A. That's right.

Q. And was it Mel who mentioned that she go and see the nurse?

A. Yes, he asked her, he said, "Have you been to see the nurse?"

And she said, "Mel, what's wrong with me, the nurse [138] cannot help me."

Q. That is it exactly what she said, "What is wrong with me the nurse cannot help"?

A. That's right.

Q. You clearly remember your wife making that statement? A. That's right.

Q. She did not complain of any illness to you or Mel at that time? A. In my presence, no.

Q. You heard her say nothing to either Mel or

(Testimony of James C. Hamilton.)

the nurse about being sick at that time before she went off the premises that day?

A. No, I didn't.

Q. Now, did she say anything further to Mel at that time other than, "What is wrong with me the nurse cannot help"?

A. You mean did she say anything else?

Q. Did she say anything else at all to him about why she was leaving?

A. Why she was leaving, no.

Q. Your answer is no?

A. She just asked for a slip to go home and which I told you that a while ago. Other than her saying anything else was wrong, no.

Q. It is customary, is it not, and it's a rule of the plant that one is ill or complains of illness or any [139] indisposition that they go to the nurse before being excused, is that not correct?

Mr. Grodsky: Mr. Examiner, I don't see how—I will stipulate if counsel tells me there is such a rule, I will stipulate that there is such a rule. I don't see how that is in issue here. He testified that she said in his presence, "What is wrong with me the nurse can't help." She just asked for a note to go home.

Trial Examiner: Well, I will permit the examination. Go ahead, Mr. Macomber.

Mr. Macomber: What was my last question?

Trial Examiner: Read the question, please.

(The question was read.)

(Testimony of James C. Hamilton.)

Q. (By Mr. Macomber): That is probably awkward, but you get the sense of it?

A. As far as I can say, I don't know because when I had to go home, you didn't have to have no pass and I didn't have to get a pass.

Q. Do you know whether your wife on occasions prior to the date in question got passes to leave the plant?

A. She probably did. I can't recall.

Q. You know of your own knowledge, don't you, that when an employee, at least a female employee, wanted to go for any reason, wanted to go home, she would have to report to the foreman that she was leaving and get a pass? [140]

A. No, I didn't know.

Q. Did you know or did you not know that an employee, if an employee left their job because of claimed illness that they were to seek a pass from the foreman to first go and see the nurse?

A. Will you repeat part of that, please?

Mr. Macomber: Will you read the question, please?

(The question was read.)

The Witness: I believe that has just been handed down, not within the last week or two, about, say, I don't know for sure, just by hearsay, that is all I can say.

Q. (By Mr. Macomber): Are you familiar, were you familiar prior to February 10 with a company rule reading as follows: "An employee leaving the premises of the company other than at the

(Testimony of James C. Hamilton.)

regular quitting times must secure a pass from the foreman and turn it into the personnel office?"

A. By the company, no.

Q. Are you familiar with company rules being posted on the bulletin board?

A. I don't keep up with them too much.

Q. Do you read the bulletin board?

A. Once in a great while.

Q. In any event, if I understand your answer correctly, you are not aware of the existence of any company rules posted or unposted, prior to February 10, 1954? [141]

Mr. Grodsky: I will object to that question, Mr. Examiner, as going beyond the scope of any previous examination. Does counsel mean a rule with reference to leaving or does he mean any company rule with reference to any subject?

Mr. Macomber: I'm asking him—he's answered my specific question. I'm asking now about whether he is familiar with the publication of the company rules at all.

Trial Examiner: Objection overruled.

The Witness: I will say by hearsay.

Q. (By Mr. Macomber): Only by hearsay, but you never undertook, yourself, as an employee to find out what those rules are, is that right?

A. No.

Q. And if they had been or are posted on the bulletin board, you haven't taken occasion to familiarize yourself with them? A. No.

(Testimony of James C. Hamilton.)

Q. Nor has your union apprised you of the contents of the company rules?

Mr. Grodsky: I will object to that, Mr. Examiner.

Mr. Macomber: That may be a little far afield. I'm talking about the United Mine Workers, but I will withdraw the question.

Trial Examiner: Very well. [142]

Q. (By Mr. Macomber): Did you ever have occasion at any time—withdraw that.

Do I understand from your previous answer that you gave me that when you left the plant you just went. That is all there was to it, you didn't bother to get any passes?

A. I will say at one time. Like I say a while ago, by hearsay.

Q. I don't want to know what you say by hearsay. I want to know what the answer to my question is, whether I understand correctly from your testimony that you didn't bother to get any passes when you wanted to leave the factory, you just went?

A. I will answer, I will say at one time, yes.

Q. What do you mean by that?

A. That I did not have to have a pass.

Q. You just went out, that is all.

A. I had permission to go.

Q. Did you ever at any time prior to February 10, 1954, obtain a pass for the purpose of leaving that plant?

A. Yes, I have obtained passes.

Q. How many times?

(Testimony of James C. Hamilton.)

A. That I wouldn't say here lately because I have a different foreman now.

Q. As many as five or six or seven times?

Mr. Grodsky: Are we confining ourselves to prior to [143] February 10?

Mr. Macomber: Any time. I don't care.

Mr. Grodsky: I do care. That is why I'm interested.

Trial Examiner: I think we ought to confine ourselves to prior to February 10, 1954.

Q. (By Mr. Macomber): Prior to February 10?

A. Quite a few times with premission and with a pass.

Q. Then you are familiar with the general procedure which calls for an employee getting a pass from his foreman?

A. Like I say, by hearsay.

Q. You mean you heard through various persons, from what people said that there was such a rule?

A. That's right.

Q. And that is what you mean when you say "like I say by hearsay"?

A. By hearsay.

Q. Nobody came to you and handed you a written document telling you about the rule but you just understood that was the rule from what everybody told you around the plant, is that right?

A. Yes.

Q. And it wasn't customary, was it, for an employee if they wanted to leave their job either because of illness or because of dissatisfaction with the

(Testimony of James C. Hamilton.)

job to just walk off? A. On some, I [144] guess.

Q. What do you mean by that?

A. Some didn't get the pass and some did.

Q. Who are some who did get the pass?

A. That I don't know the names.

Q. Who are some who do not get the pass?

A. Here lately from what I see is some girls, like I say, at some times I didn't get a pass, but here lately I have seen the girls get one being this new rule came in.

Q. I want to learn about this new rule, when did you hear about a new rule?

A. When one just started up here last Thursday.

Q. Where did you hear about the new rule?

A. In the plant.

Q. Did somebody hand you a bulletin announcing a new rule on the bulletin board?

A. No, but it came out from the leadlady and vice president of that union, IAM.

Q. What union? A. IAM.

Q. Who told you about this new rule?

A. Dorothy Randall, for one.

Q. She told you about a new rule?

A. Yes.

Q. What did she tell you about the new rule and when did she tell you about it? [145]

A. She said the rule that came out was that she cannot go into the women's bathroom after five

(Testimony of James C. Hamilton.)

minutes to 4:00 and that at any time in there you can't stop to comb your hair and put lipstick on.

Q. And that is Dorothy Randall that told you? Who is she, a fellow employee or what?

A. She's a packer.

Q. She is a fellow employee, is that right, she is not a forelady or committeewoman or anything of that kind? A. No.

Q. Who else told you about that?

A. Leadlady, I think Helen Greenwood.

Q. Anyone else?

A. Then there's a foreman and I don't know his last name.

Q. Do you know whether your wife ever had occasion to discuss with you the grievance procedure which the union had with the Essex Wire Corporation?

Mr. Grodsky: Object, Mr. Examiner, beyond the scope of direct examination. I don't see what relevancy that has to this proceeding.

Mr. Macomber: I think it has this relevancy—you apparently see my point?

Trial Examiner: No, I don't. I was about to ask——

Mr. Macomber: Well, I was going to say this, I don't know now whether this woman was sick or claims to be sick [146] or whether she was dissatisfied with the nature of the job. I have in mind what appears in the union contract which counsel has put into evidence a grievance procedure for those who apparently are dissatisfied with the con-

(Testimony of James C. Hamilton.)

ditions of their employment and presumably the nature of their job and I'm seeking by this question because this man is, actually, after all, the husband of this lady, to know whether he knows some discussions with her that she was aware of that grievance procedure.

Mr. Grodsky: Assuming she was aware, it's still under the Board's rules it would not be the exclusive remedy even if she didn't want to take advantage of it.

Mr. Macomber: I appreciate that. If there was a violation of law, there would be a violation of law whether or not a grievance was resorted to. But bearing upon the good faith of the individual's concern, their motivation and their good faith, I think that it would certainly have some bearing as to whether or not there was any consideration given to the matter of invoking the grievance procedure which is an integral part of the working arrangement between the Essex Wire Corporation and the union with which she was affiliated and of which she was technically a member, is a member.

The Witness: She was expelled.

Mr. Grodsky: I believe the company knows that she was [147] expelled.

Mr. Macomber: When, with relation——

Trial Examiner: Be that as it may, there is some Board law on the subject of whether or not an individual may allegedly claim a discriminatory grievance may have held against them. For the purposes of the Board's decision in a particular

(Testimony of James C. Hamilton.)

case, the fact that they did not invoke the grievance procedure when the factual situation is such that they would have been compelled to invoke the assistance of the union with which they rated opposition, to the best of my recollection, the Board's law on the subject is that the failure to invoke the assistance of a union when entitled to a grievance procedure is not to be held in any respect against them when, in fact, the situation is such that they would have been called upon to ask the assistance of persons with whom they are in opposition.

Mr. Macomber: Isn't that assuming something in this case which is the subject of inquiry and determination? Here we have admittedly apparently a lady who was a member of the IAM union. She was not a member of the United Mine Workers so far as I'm apprised and a member, apparently, in good standing at the time she, let us say, that is, from the company's point of view, walked off the job.

If there was a dissatisfaction with that job, and conceding that she did not have to exhaust [148] administrative remedy in the technical sense—let's concede that. Still, I think bearing on good faith and motivation there should be considered whether or not as a member in good standing of this union, apparently, she didn't give some consideration to invoking that procedure which was established by the union and the company for the protection in cases just like we have here.

Trial Examiner: The record in this aspect of the case is still to be developed. I'm not going to

(Testimony of James C. Hamilton.)

indulge in an assumption as to what the record may show. I will overrule the objection.

Q. (By Mr. Macomber): As the husband of Mrs. Hamilton, I assume that shortly after that incident of February 10, you had occasion to discuss the problem with her, did you not? I'm being most general in my question. I say on the problem of leaving the job, you had a discussion about that with her?

Mr. Grodsky: Before the witness answers, I wish to raise an objection based on the fact that this is a confidential communication between husband and wife.

Mr. Macomber: I think that only the husband and wife can invoke that confidential relationship and if they want to invoke it, why, I will certainly honor it without trying to press the matter but I don't think it is a privilege which counsel can [149] assert.

Trial Examiner: Objection overruled.

Q. (By Mr. Macomber): Did you have any such confidential relation with your wife regarding the subject that you didn't want to answer the question as to whether you and your wife discussed the problem after she left the job on February 10?

A. We have talked about it.

Q. Shortly thereafter, was any consideration given by your wife in these discussions she had with you as to invoking the grievance procedure of her union clause?

A. Not with the IAM, no.

(Testimony of James C. Hamilton.)

Q. Do you know how long after February 10, it was before she went down to see Mr. Sabatino?

A. Not the same day.

Q. About a day?

A. About a day or two days.

Mr. Macomber: When does the record disclose that she filed her complaint initially? May I inquire, counsel?

Trial Examiner: February 12.

Mr. Macomber: February 12 was the date and where was that complaint filed, here or is that the date of receipt in Los Angeles?

Mr. Grodsky: The charge was filed in Los Angeles. The charging party went to Los Angeles and filed the charge.

Mr. Macomber: She went to Los Angeles. [150]

Q. (By Mr. Macomber): Did you urge her to go to Los Angeles?

Mr. Grodsky: I will object to that, Mr. Examiner. This is very collateral.

Trial Examiner: What is the materiality of this?

Mr. Macomber: It's the same materiality as I previously indicated. I want to show that so soon, now, here is the 10th that she walks off the job or goes off the job. I realize the circumstances under which she left is the subject of dispute. At least, she goes off the job, presumably, has a complaint and if it's a good faith complaint, we are raising the question of having the knowledge of grievance procedure and we are going to show that he had

(Testimony of James C. Hamilton.)

knowledge of the grievance procedure. He filed and reverted to grievance procedure a couple times.

The Witness: One time.

Q. (By Mr. Macomber): The witness says "one time." You were aware of grievance procedure?

A. I filed a grievance one time.

Mr. Macomber: For him to walk right down and file a complaint, I think bears upon the motivation, bears upon the good faith of the complaint. It shows a pattern of organizational activity on the part of this United Mine Workers to try in some way or other to stir up some difficulty there in the plant. [151]

It must be perfectly obvious that that is what we have got to assume as having taken place here.

Trial Examiner: I think I have heard enough to get the drift of respondent's argument.

Mr. Macomber: Surely.

Trial Examiner: And I have permitted the examination with respect to the discussion, if any, in regard to grievance procedure and the consideration, if any, given to the invocation of grievance procedure because of the fact that the record with respect to whether or not it could reasonably have been resorted to is still deficient and I'm waiting for full development of the record to assess the actual weight given to the witness in that regard.

However, in respect to whether the charge was filed immediately or whether an interval was allowed to lapse or whether filed immediately after

(Testimony of James C. Hamilton.)

consultation with the UMW, I'm going to sustain the objection presented by General Counsel.

Off the record.

(Discussion off the record.)

Trial Examiner: On the record. We will recess for five minutes.

(Short recess taken.)

Trial Examiner: The hearing will be in order.

Q. (By Mr. Macomber): Now, you told us, Mr. Hamilton, [152] on direct examination, that you on or about the time of this incident of February 10 said something like this to Mel: "Why are you picking on Ann?"

And then he denied that he was picking on Ann. Is that right, you made some statement why he was picking on Ann which he promptly denied, is that correct? A. Yes.

Q. And he told you that he was in a position where he couldn't show any partiality at all, is that right? A. That's right.

Q. But you had accused him of picking on Ann. Now, I want to ask you whether that was on the basis of this incident of February 10 that you accused him of picking on Ann?

A. I didn't accuse him of picking on Ann. The statement that I made, I said, "Why is it that every time somebody has to go on another job, why is it Ann has to go."

Q. All right. Now, your wife had worked, I

(Testimony of James C. Hamilton.)

think you told us, on some job on the rotary conveyor some time about December 15, 1953. Thereafter, she worked, did she not, on this taper job?

A. I believe so.

Q. And did she remain on the taper job until February 10, 1954?

A. I can't say for sure.

Q. Do you know any other job that she was called on to [153] perform between December 15, 1953, and February 10, 1954, when she was put over on the rotary conveyor?

A. Within that period, I would say no.

Q. Would you say between the period of December 15, 1953, and February 10, 1954, that she worked continuously on the taper machine?

A. I say except for the time they took her off that time.

Q. And the time they took her off, that time was February 10? A. Yes.

Q. Is that what you mean?

A. Yes, sir.

Q. And she was happy on the taper job, wasn't she, so far as you know? A. Yes, sir.

Q. And before she left on February 10 while yet the nurse and while still the foreman was there, as far as you knew, she was happy with the rotary conveyor job, wasn't she, as far as anything she told you?

A. As far as I know there at the plant, I would say yes.

(Testimony of James C. Hamilton.)

Q. Now, you told us that her hands were all bloody?

A. That's right, they were bleeding.

Q. Were they really bleeding profusely, was blood dripping from her hands?

A. No, wasn't bleeding that bad. [154]

Q. Could you see the blood plainly on her hands?

A. Yes.

Q. Had it gotten messy on her hands so that you could see it very clearly?

A. Not that messy.

Q. Did you speak to the nurse about taking care of those hands? A. No, I didn't.

Q. She was right there, wasn't she?

A. Yes.

Q. And you didn't say anything to the nurse about taking care of those hands, giving her any first aid? A. Not at the present time.

Q. And you didn't say anything—strike that.

She didn't say anything about not even liking the job at that time to anybody, did she?

A. In my presence, no.

Q. The only thing she said is "What is wrong with me, the nurse can't help?"

A. That's right.

Q. And she never went on to expand on that at that time? A. No, sir.

Q. Whereupon she left the plant, is that right?

A. With permission.

Q. Now you told us in that regard that Mel at first told her [155] that she would have to get a

(Testimony of James C. Hamilton.)

slip or have a slip? A. No.

Q. Mel told her she would first have to see the nurse, did he not?

A. No, he didn't tell her that.

Q. He just said, "You can go"?

A. He said, "You go home and I will fill out the slip for you and turn it in to the nurse myself."

Q. Do you know whether she had any gloves on February 10 issued to her by her foreman?

A. Well, I do know, I guess it was right at the break, or right before the break her committee-woman, Betty Cave, gave her a pair of gloves.

Q. Betty Cave? A. Yes.

Q. Now, was it after your wife left that you had the next conversation with Mr. Simon at the coffee tables? You told us that at 10:30, February 10, you talked to Simon at the coffee table. Was that before or after your wife had departed?

A. It was after she had left.

Q. Had your wife at that time told you that she was dissatisfied with the job, or sick, or either one of them at the time that you had this conversation with Mr. Simon? A. No.

Q. So you were at that time totally in the dark as to why [156] your wife left, is that right?

A. That's right, at the time.

Q. Now, you told us about some discussion at that time between yourself and Mr. Simon. Now, isn't this, in fact, what Mr. Simon told you that he was on the spot insofar as there was any organizational or campaign activity going on and that

(Testimony of James C. Hamilton.)

whereas he didn't have any control over whether you wore or didn't wear a button, that you couldn't pass them around between each other and that you couldn't engage in any membership campaigning. Now, isn't that in substance what he told you?

A. To my memory, it is not.

Q. You say to your memory it is not. Is there some doubt about your memory?

A. No doubt. The one time he told me to take the button off.

Q. At one time, but you only concede at one time. You are not sure he told you on two occasions to take them off?

A. Both times.

Q. Did you tell him that your union boss or union leader, Mr. Sabatino, whatever his name is, had told you it was lawful?

A. No, I didn't mention it.

Mr. Macomber: I think that is all.

Redirect Examination

By Mr. Grodsky:

Q. On February 10, the day that your [157] wife left the plant, was there any time before she left the plant when you and she and the nurse were together?

A. No.

Q. The only time where you were present when the nurse was present was at the time after Ann had left, isn't that correct?

A. That's right.

Q. Now you testified that you had asked Mr. Kresin why they always selected Ann when they

(Testimony of James C. Hamilton.)

had to take someone off the tapers, is that what you asked him? A. Yes.

Q. Did you have in mind any earlier occasions before December, when she had been taken away from her job?

A. Yes, I guess four or five times.

Q. When she originally went to work did she go to work on the tapers? A. That's right.

Q. And in between the time that she went to work originally on the taper and the time that you were talking to Mr. Kresin in February, she had been taken off her job at the taper on a number of occasions, is that correct? A. Yes.

Q. That is what you had in mind when you were talking to him? A. Yes. [158]

* * *

Mr. Macomber: Just one question.

Do you remember a conversation with Mr. Simon in which he spoke to you about the use of the phone and receiving personal calls on company time?

The Witness: I do.

Mr. Macomber: When was that conversation with Mr. Simon with relation to February 10?

The Witness: I believe right before I went in the rest room I had received a call at the phone and Mr. Simon and Fred was standing over there by the coke machine, I believe, I think that is where they were standing.

Trial Examiner: By what machine?

The Witness: The coke machine. And that is

(Testimony of James C. Hamilton.)

when he said that if I had a call come in it would have to come through the office.

Mr. Macomber: That is all.

Q. (By Mr. Grodsky): Did I understand that that conversation with Mr. Simon was on the same date that Ann was discharged, on February 10?

A. I believe it was.

Q. Was that the same conversation that you were telling us before, that is, does this conversation about using the telephone in the same conversation in which he asked you why you were coming from the bathroom? A. It was. [159]

Mr. Macomber: Had you been in the habit of making calls without getting prior permission?

The Witness: No, sir. Every time I made a phone call it was either on my own time or I would get permission from my foreman.

Mr. Macomber: What do you consider your own time in answering that question?

The Witness: Well, break period, either at lunch time or before I started to work.

* * *

Mr. Macomber: I would like to call Mr. Simon.

Trial Examiner: On the basis of the understanding reached off the record, it is my understanding at the present time that General Counsel has no objection to respondent calling Mr. Simon out of order for the purpose of presenting what will be a part of respondent's direct case.

Mr. Grodsky: That is correct. [160]

MITCHELL J. SIMON

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Macomber:

Q. You are Mr. Simon who previously was sworn and testified in this matter, of course?

A. Right.

Q. I have briefly exhibited to General Counsel and I now hand you a document entitled "Essex Wire Policies, Rules and Regulations" and I will ask you what these rules and regulations purport to be.

A. These are standard rules and regulations adopted for all assembly divisions and modified for particular localities.

Q. Are those the rules and regulations that were enforced by the Essex Wire division here in California?

A. They have been enforced since the start of operations in San Diego.

Q. That is approximately when?

A. Well, I can say since September, 1948, because that is when I came out here.

Q. What publicity has been given to the existence of those rules and regulations, will you tell us, generally?

A. These rules and regulations have been handed to the union on each, at each negotiating session.

(Testimony of Mitchell J. Simon.)

They were posted [161] on the bulletin board and the walls in the plant. They were subsequently taken down after they had become tarnished and dust ridden and so on.

At the last negotiation, the union then requested a review of the company rules and regulations and asked us if we would not consider when we are printing our agreement if we wouldn't take a section of that little booklet that we have used previously and put that in there because it would be more convenient rather than having to answer the questions from that particular sheet.

We had them posted and they have copies of same and have had since 1948.

Mr. Macomber: I will offer these as respondent's first exhibit.

The Witness: Also, I might add, Mr. Macomber, that we have copies of these rules as corporate policy dating back, I believe, somewhere in 1937.

Q. (By Mr. Macomber): I want to call your attention——

Mr. Grodsky: They have been offered?

Trial Examiner: Yes, they have been offered. Is there any objection?

Mr. Grodsky: Yes, I would like to have the witness on voir dire on them. Although, if you will reserve your offer until after you begin examining the witness, I have no objections to that. [162]

Mr. Macomber: Well, I was going to offer them. I thought it would be more timely with the ques-

(Testimony of Mitchell J. Simon.)

tion I was about to propound after I offered the document.

You have an objection to this?

Mr. Grodsky: Yes.

Mr. Macomber: But I understood that we——

Mr. Grodsky: I just want to ask the witness some questions as to the promulgation.

Trial Examiner: Very well. You may have the witness on voir dire.

Voir Dire Examination

By Mr. Grodsky:

Q. Mr. Simon, have these rules ever been changed and, by that, I mean the text of any one of those rules, has it ever been changed since you have been at the plant? A. No, sir.

Q. Have those rules been posted—strike that.

When was the last time, to your knowledge, that the rules have been posted?

A. At the beginning of the last contract period. That is not the contract that we signed with the existing union in June or thereabouts. They were given, copies were given to the union and they were posted at that time and subsequently are on file at any time any employee wanted a copy of it.

Q. In other words, the contract that you have in mind is a [163] contract that is dated January 15, 1954, is that correct?

A. That is the last time we put them upon the board, that is correct.

(Testimony of Mitchell J. Simon.)

Q. That is the last time you put them up on the board. How long did they stay up on the board at that time?

A. Well, the copy was up on the board, was taken down prior to negotiations of this new contract which was signed in June.

Mr. Macomber: June of this year?

The Witness: That's right, and we started negotiating that contract 60 days prior to its expiration date which was May 15.

Q. (By Mr. Grodsky): Mr. Simon, do I understand correctly that was posted from January 15, 1953, until approximately 60 days before May 15, of 1954?

A. When you say that, what are you speaking of, the same piece of material?

Q. I'm talking about the rules that, the company rules, I don't mean that specific one, but I mean a copy, a full copy of the company rules was continuously posted during that period of time?

A. Yes, to my knowledge.

Q. Where was that posted?

A. On the bulletin board where we post our hours and wages and so on specified by government regulations.

Q. Somebody was testifying here about a bulletin board that [164] is under glass, is that the same one?

A. No, sir.

Q. Mr. Simon, isn't it a fact that that was posted on the bulletin board after February 10, of 1954?

(Testimony of Mitchell J. Simon.)

A. No, sir, this was being reviewed during negotiations and this one as yet is not out and won't be out until it comes back from the printers. It was reviewed at the negotiating time with the negotiating committee. They raised some objections to some of the rules and we reviewed it and it will be issued as soon as the copies of the contract are back from the printers.

Q. Mr. Simon, do I take it, then, that these are not the rules that are in effect, these are changed rules now? A. No.

Mr. Macomber. He doesn't say that.

The Witness: They were reviewed.

Mr. Macomber: He said they had been changed since recent negotiations. He said that was 60 days before the expiration.

Trial Examiner: Just a moment, Mr. Macomber. Mr. Simon, I'm in some confusion now because of the way the record has developed. We have a particular document which is seven pages long now offered in evidence as Respondent Company's No. 1. Now, that document, seven pages all clipped together, does that reflect the rules as they were in effect on January 15, 1953, and thereafter until May 15, 1954, or does that [165] particular document now before Mr. Macomber reflect the rules as they now stand or is there any difference?

The Witness: The rules are the same. There's been a word or two changed. It is identically the same rules set forth in company policy. That is corporation policy and modified to fit the local plant.

(Testimony of Mitchell J. Simon.)

Now, wherever a particular item referred to, for instance, badges, we don't have badges, we have passes. So we changed the word "badges" to "passes." I mean the rule itself has not been changed.

Mr. Macomber: See if I understand you correctly, these rules that are embodied in this document which is offered in evidence are the rules that were in force and effect up until here quite recently when you went into further negotiations with the union and changed a few words here and there?

The Witness: That is correct.

Mr. Macomber: And this is the document to which you referred had been on the bulletin board, posted until 60 days prior to the last negotiating period?

The Witness: The rules are the same.

Mr. Macomber: Does that answer it?

Mr. Grodsky: No, it doesn't. He keeps saying the rules are the same. I want him to say the document is the same.

Mr. Macomber: The document is the same. It may have been brown paper, green paper, we don't know.

Trial Examiner: I see the point Mr. Grodsky is driving at. [166]

If I understand correctly, Mr. Simon, General Counsel's Exhibit 1 for identification is not a verbatim copy of the rules and regulations that were posted according to your recollection after January 15, 1953?

(Testimony of Mitchell J. Simon.)

The Witness: That is correct.

Trial Examiner: But it is your testimony that the substance of the document, General Counsel's 1 for identification, is the same as the substance of the document that was posted since the only changes between General Counsel's 1 and the document actually posted relates to certain words which did not change the sense of any rule?

The Witness: That is correct, sir.

Mr. Macomber: That is Respondent's 1.

Trial Examiner: I'm sorry, Respondent's 1.

Q. (By Mr. Grodsky): Just a minute. Is it your testimony, Mr. Simon, that before February 15, of 1954, a document similar to that may be differing in one or two words, as you say, was posted and was on display for the employees to see at the bulletin board about which you have testified? A. Yes, sir.

Q. And that bulletin board is just outside of Mr. Harms' office? A. No, sir.

Q. Where is that bulletin board located?

A. Located in the main aisle past the timeclock as you are [167] leaving the plant and located, I would say, just about five feet east of the bulletin board which I referred to with the glass cover. The same of which has been given to the union, as I stated, at every negotiating session and the same of which is on file in the personnel department available to anybody by their request.

Q. How many clocks do you have there, time-

(Testimony of Mitchell J. Simon.)

clocks? Do you have them designated Clock No. 1 and Clock No. 27?

A. We have three clocks.

Q. Do they have designations; Clock No. 1, Clock No. 2, and No. 3? A. No.

Q. Have you ever heard the employees refer to any specific clock as Clock No. 1? A. No.

Q. Or any of the foremen refer to any clock as Clock No. 1? A. No, I haven't.

Mr. Grodsky: I have no further questions on this, Mr. Examiner.

Mr. Macomber: I renew my offer.

Trial Examiner: Is there any objections to the offer?

Mr. Grodsky: Yes, I object to the offer because this demonstrably is not the document that was posted. He says it's like the document. I say it's not. I say that either we have the document that was posted or we don't have the document [168] that was posted.

Mr. Macomber: I don't know that I ever heard of such an objection. I don't know whether it is the best evidence or what he is invoking but the testimony is that a document, as I understand it, substantially of identical form as that was posted. Is counsel insisting that we go out and get the time-worn particular document that happened to be stuck on the wall that may have been pulled down and long destroyed with testimony that an exact copy of this and others were posted?

I submit that for our purpose this is adequate

(Testimony of Mitchell J. Simon.)

foundation for the admission of this document, Mr. Examiner.

Trial Examiner: On the basis of the testimony, I'm going to rule that the document offered for identification as Respondent's No. 1 is sufficiently illustrative of the document that actually was posted to be received in evidence for whatever value it may have. I will overrule the objection and receive Respondent's No. 1.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 1 and was received in evidence.)

RESPONDENT'S EXHIBIT No. 1

Essex Wire Policies Rules and Regulations

* * *

Rules of Conduct

The following are legitimate cause for immediate discharge:

* * *

16. The circulation of petitions for any purpose whatsoever on Company property without prior approval by the Company.

* * *

(Testimony of Mitchell J. Simon.)

Rest Periods

Female and male employees shall have two ten (10) minute rest periods with pay for each seven and one-half ($7\frac{1}{2}$) or eight (8) hour shift at stated times consistent with production.

* * *

Received in evidence August 2, 1954.

Trial Examiner: However, before Mr. Simon leaves the stand I have only one question that I'd like to ask in that regard. Your testimony, as I understand this, was posted on the bulletin board not covered by a glass cover?

The Witness: Yes, sir.

Trial Examiner: And you have previously referred to the [169] fact that the document consisted of seven pages. Was it posted in the form in which it now appears, that is, with the pages stapled together or was it posted with each page separately open to view?

The Witness: Just as it is, sir, pinned in the corner and you would have to thumb through it.

Direct Examination (Continued)

By Mr. Macomber:

Q. Was just one or more than one posted?

A. Just one.

(Testimony of Mitchell J. Simon.)

Q. Just one. Was any other publicity given to the existence of these rules and regulations other than posting it on the board?

A. Our contract refers to the rules and regulations.

Q. You work with the union and copies of these were given to the union, is that correct?

A. That's right.

Q. I call your attention now to a part of the document under the designation "Passes" in which the following appears: "An employee leaving the premises of the company other than at the regular quitting times must secure a pass from the foreman and turn it in to the personnel office."

What general publicity was given to the existence of that provision of the rules and regulations other than the posting of a document similar to this on the bulletin board?

A. Procedure and habit by the foremen and employees. [170]

Q. Tell us more particularly about that.

A. Well, anybody who leaves the job and even if they want to go during working hours, the rule is that if they want to go to the First Aid, they get a pass from the foreman, take it to First Aid. After they leave, bring the pass back to the foreman and in case of emergency, they don't do it, it is waived. That is part of our rules and regulations.

Q. How is that impressed upon employees when they start working?

(Testimony of Mitchell J. Simon.)

A. They just can't walk off the job. That is all there is to it.

Q. I know, you say that but what we are trying to get is what is done to impress that, more particularly in the case of Ann.

In the case of Ann Hamilton back there, she had obtained prior to February 10 on several occasions passes, had she not?

A. That is correct, but copies of which were in the personnel file.

Q. And is there a foreman to instruct them of the existence of this rule or not?

A. Absolutely. Otherwise, all of the people would go off the job at the same time. You couldn't run a business that way.

Mr. Macomber: I offer this document.

Trial Examiner: Very well. I have already received it. [171]

Anything further of Mr. Simon?

Mr. Grodsky: Yes.

Cross-Examination

By Mr. Grodsky:

Q. Mr. Simon, do you know of your own knowledge whether the foremen in their discretion permitted employees to leave and told them that they would fill out the necessary passes for them—if they are working contrary to rules?

A. It's not company policy.

Q. The question is whether you know whether that has happened.

(Testimony of Mitchell J. Simon.)

A. No, sir, not to my knowledge.

Q. Then, I take it, that to your knowledge no employee has ever left the plant without a pass being filled out in advance?

A. Not until or unless it was a case of extreme emergency which I stated the rule was waived.

Q. Does the rule say something about waiving the pass rule?

Mr. Macomber: It says that in case of extreme emergency passes must be obtained except in the case of extreme emergency, words to that effect.

Trial Examiner: If it is material, I will state for the record that on Page 1 of the document received in evidence as Respondent's 1, there appears under the general caption "First Aid Service," a second paragraph dealing with the [172] pass requirement in cases involving reference to the First Aid Room and at the end of that second paragraph the last sentence on the page reads, "This provision may be waived in cases of extreme emergency."

I will also state for the record that on Page 4 of the document at the top of the page under the general subheading, "Passes" in the case of employees leaving the premises of the company and at no point under that general subheading on Page 4 do I find a reference to emergency situations.

Q. (By Mr. Grodsky): Then it's your testimony that to your knowledge no foreman has ever authorized any employees to leave the plant without having had a pass in advance?

(Testimony of Mitchell J. Simon.)

A. That's right.

Mr. Grodsky: No further questions.

Trial Examiner: You may be excused.

(Witness excused.)

Trial Examiner: At this time pursuant to the understanding, we will recess the hearing until tomorrow morning at 9:30 a.m. at the same place.

(Whereupon, at 4:40 o'clock p.m., Monday, August 2, 1954, the hearing adjourned until Tuesday, August 3, 1954, at 9:30 o'clock [173] a.m.)

PROCEEDINGS

Trial Examiner Miller: The hearing will be in order.

Mr. Macomber: Mr. Examiner, may I have your indulgence for just a moment?

Trial Examiner: Surely.

Mr. Macomber: Mr. Simon seems to have located the original document posted on the bulletin board which is General Counsel's No. 2 in evidence and which has been the subject of some uncertainty in the testimony and it occurred to me that now would be the logical time very briefly, even if out of order, to present this bulletin. It would take only a minute with Mr. Simon even though somewhat out of order.

Mr. Grodsky: I'm very agreeable with that.

MITCHELL J. SIMON

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Macomber:

Q. Mr. Simon, did you last night in some manner or other among your files find the original posted bulletin which is General Counsel's No. 2 in evidence? A. I did.

Q. And do I now hand you that bulletin?

A. This is the same bulletin that was posted on the [177] bulletin board under the glass referred to in yesterday's testimony.

Q. I notice in the top left-hand corner is written "Post and return 1-14-54."

Whose handwriting is that and what is the significance of that?

A. That is my handwriting and I wanted to be sure I got the copy back. One went to the legal department in Detroit and the other I retained in my file.

Q. Up in the left-hand corner there seems to be a pin prick hole of some kind or other and an indentation encircling that perforation.

What does that indicate?

A. That is where it was tacked up on the bulletin board.

Q. Is that the one under the glass?

A. That is the one under the glass.

(Testimony of Mitchell J. Simon.)

Mr. Macomber: I offer this as Respondent's No. 2. I don't believe counsel has seen it yet.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

As a result of the discussion off the record, at my suggestion, it appears that counsel is satisfied that the document just presented to Mr. Simon and identified by him is an exact copy in every particular except those indicated [178] in his testimony just offered of the document already received in evidence as General Counsel's 2 and since it is exactly similar in every respect except for the perforations, or perforation, noted at the top of the page and the pencil notation referred to by Mr. Simon, it was my suggestion it might obviate any necessity for receipt in evidence as an independent exhibit if counsel will stipulate it might be physically substituted for the document already received in evidence as General Counsel's 2.

It is my understanding counsel will so stipulate?

Mr. Grodsky: We will so stipulate.

Trial Examiner: Very well. The document identified by Mr. Simon may be substituted for a document previously received in evidence as General Counsel's 2 and I turn over the document just identified to the reporter.

(Testimony of Mitchell J. Simon.)

Cross-Examination

By Mr. Grodsky:

Q. Mr. Simon, was there any other notice relating to solicitation posted?

A. Not to my knowledge? [179]

* * *

HELEN IRENE GREENWOOD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. Will you state your name, please?

A. Helen Irene Greenwood.

Q. What is your address, Mrs. Greenwood?

A. 4085 Idaho.

Q. Is that in San Diego? A. Yes.

Q. What is your position with Essex Wire Corporation?

A. I'm a leadwoman on the No. 1 conveyor.

Q. Is the No. 1 conveyor also known as the big rotary conveyor? A. Yes. [181]

Q. Did Ann Hamilton work on the big rotary conveyor? A. At her own request, yes.

Q. That was during what dates, if you recall?

A. It was before the holidays. I don't recall the date.

(Testimony of Helen Irene Greenwood.)

Q. And about how long did she work there at that time?

A. Oh, approximately three weeks.

Q. When you say "before the holidays," you mean before Christmas of 1953? A. Yes.

Q. What job or jobs did she have on the conveyor at that time?

A. At that time she was taping.

Q. Did there come a time when she came back to work on the big conveyor?

A. No, she was, she had filled in when I had a girl absent. She wanted to try working on the conveyor but that was before she actually worked on it, I mean, steady. She had requested she'd like to try it.

Q. Now, you are talking about things that happened in 1953?

A. Well, prior to the time that she came on the conveyor, yes.

Q. Did there come a time after Christmas of 1953 when she worked on the conveyor?

A. Well, the day that she left the conveyor.

Q. Well, do you know what date that was? [182]

Mr. Macomber: Well, we can stipulate——

Mr. Grodsky: Can we stipulate that was the same day, counsel, can we stipulate the date is February 10?

Mr. Macomber: February 10 is the date. I think it's beyond dispute.

Q. (By Mr. Grodsky): I will suggest to you, Mrs. Greenwood, that that was on a Wednesday,

(Testimony of Helen Irene Greenwood.)

February 10, of this year. Does that refresh your recollection as to the date it was? A. Yes.

Q. Now, under what circumstances was Ann Hamilton assigned to work on the big conveyor that morning?

A. Well, we needed an experienced girl on the repair table and, also, an experienced girl on the No. 1 conveyor to take this other girl's place.

Q. All right. Now, did you talk to someone about getting the girl? A. In the morning.

Q. Yes. A. Yes, we——

Q. To whom did you talk about getting the girl?

A. To my foreman.

Mr. Macomber: Who is he?

The Witness: Mr. Kresin.

Mr. Macomber: Pardon me for butting in like that.

Mr. Grodsky: It's perfectly all right. [183]

Mr. Macomber: It is easier to get the chronology of the time.

Mr. Grodsky: Right.

Q. (By Mr. Grodsky): About what time of the morning did you talk to Mr. Kresin about that?

A. After the first whistle had blown, he told me that the repair girl was absent and that could I, if I had a girl on the conveyor that could do the repair work and I have two experienced girls that had been on the repair table, Inez Hobbs and Jo Hutchins.

Mr. Macomber: They are repair girls, so-called? They have been on that station?

(Testimony of Helen Irene Greenwood.)

The Witness: Yes.

Mr. Macomber: Thank you.

Q. (By Mr. Grodsky): All right. What did you do, if anything, at the time that he told you that the repair girl was absent?

A. He said he may have to use one of my girls off the conveyor and let it go at that.

Mr. Macomber: When you say "and let it go at that," you mean he said, "Let it go at that"?

The Witness: No, he didn't say anything. That is what had happened.

Mr. Grodsky: Mr. Examiner, I think it would be a little more orderly if I proceeded to examine the witness. [184] I think I can clarify these things as I go along.

Mr. Macomber: All right. I will try to avoid any interruptions.

Q. (By Mr. Grodsky): Did Mr. Kresin talk to you further about this matter during the morning?

A. No.

Q. What was the next thing that you knew about the incidents leading up to Ann Hamilton coming to work on the conveyor?

A. Right before she came down, her leadlady told me she was sending Ann to the conveyor.

Q. And the leadlady is Peggy Redden?

A. Peggy Redden.

Q. All right. What happened then?

A. At the time that Ann came on the conveyor, I was at the other end relieving a wire girl and I

(Testimony of Helen Irene Greenwood.)

motioned for Inez to go to the repair table and for Ann to step in her place.

Q. What was Inez doing at that time?

A. At the time she was on the wire station and Inez went to the repair table and Jo Hutchins left the take-off station and went to the wire station.

Q. Then, in other words, you motioned to Inez to leave the wire station and to go to the repair table? A. Repair table.

Q. And you motioned to Jo to leave the take-off station [185] and go to the wire station?

Trial Examiner: Is that correct, you directed Miss Hutchins to take Inez' place?

The Witness: Yes, when Mr. Kresin told me he may need the repair girl, I had told them that either one of them would have to go so they did know in advance that they would have to leave the conveyor and, if they did, for Jo to take the wire station and for Inez to go to the repair table.

Trial Examiner: You are referring to a conversation you had with the two girls after the original conversation with Mr. Kresin?

The Witness: Yes.

Trial Examiner: I see. Go ahead. Just a moment. If I may interrupt for just a moment, Mr. Grodsky:

Just to get clear in my own mind what is meant here by your reference to wire station and take-off station, we have had testimony here that one of the jobs done on the conveyor table is the job of placing these wires in position on a jig?

(Testimony of Helen Irene Greenwood.)

The Witness: That is a wire station.

Trial Examiner: We have had testimony that one of the jobs on the conveyor table is taking the completed assembly, or harness, off of the jig after the plastic tape has been added to it and placing on an overhead conveyor hook. Is that what you refer to as take-off station? [186]

The Witness: That is take-off.

Trial Examiner: At the time Mrs. Hamilton reported Miss Hobbs was on the wire station and Hutchins on the take-off station?

The Witness: Yes.

Q. (By Mr. Grodsky): Do you know who the repair girl is? A. Now?

Q. No, who the repair girl was at that time?

A. If I'm not—no, it wasn't. No, I don't recall.

Q. Was there a girl by the name of Frances who was repair girl?

A. For about two weeks. That has just been here recently. She is not there now.

Q. I'm talking about in February specifically, in the period of approximately February 10?

A. I don't recall who was there.

Q. Were you instructed by Mr. Kresin as to which girls to place in what jobs, I mean as between Inez and Jo and Ann? A. No.

Q. That was a decision which was left up to you in the course of your duties, is that correct?

A. Yes.

Q. Now, were you aware at the time that Ann was a supporter of the Mine Workers Union?

(Testimony of Helen Irene Greenwood.)

A. Yes. [187]

Q. In fact you probably saw her wearing her button, didn't you? A. Yes.

Q. Were you a supporter of the Mine Workers Union? A. No.

Q. Did you and other employees discuss among yourselves the problems created in the plant by the Mine Workers? A. Yes.

Mr. Macomber: I'm not going to object to this except it may be understood any conversations that the employees had among themselves would not be binding upon the Essex Wire Corporation unless one of our representatives or officials were involved.

Trial Examiner: I would assume so.

Mr. Macomber: I want to make that objection so the record will be clear.

Trial Examiner: Yes, I understand your position.

Mr. Grodsky: Will you read the last question and answer, please?

(The question and answer were read.)

Q. (By Mr. Grodsky): Did you in your discussions consider what you would do to help relieve the situation?

A. I don't understand what you mean.

Q. Well, in your discussions with reference to the Mine Workers, did you girls think in terms of what you could do [188] to help relieve the situation?

Mr. Macomber: I'm going to object to the form

(Testimony of Helen Irene Greenwood.)

of that question and I think it calls for hearsay and conclusion and opinion of this witness as to what others may think. If he is asking this witness what she, herself, might have thought, that is another thing. We don't know what discussions or discussion you are talking about.

I think we are entitled to know who participated in discussions and what was said rather than what people thought.

Trial Examiner: I find your objection well taken insofar as the question may elicit the witness' testimony as to what people thought. However, I assume that the question is a preliminary question designed to determine whether or not the witness participated in discussions of particular character.

If the answer is in the affirmative, I will require counsel to establish time, place and persons present.

Mr. Macomber: Very well.

Q. (By Mr. Grodsky): Do you remember the question? A. No, would you repeat it?

Q. Did you girls talk about what you would do?

A. Yes.

Q. With whom did you have such discussions?

A. Oh, with quite a few girls.

Q. Well, did you have any with Peggy Redden, for example? [189] A. Yes.

Q. Do you remember any specific discussion?

A. No, nothing I don't think that would have anything to do with this.

Q. Yes. But, well, what was the gist of your dis-

(Testimony of Helen Irene Greenwood.)

cussions with Peggy Redden relating to the Mine Workers situation?

Mr. Macomber: I think we ought to have time, place and persons present, Mr. Examiner.

Trial Examiner: I'm going to find merit in the point made by Mr. Macomber and suggest that to the extent of the witness' recollection we do fix time and place and persons present.

Q. (By Mr. Grodsky): Can you place a specific date when you had such a discussion?

A. No, because we were discussing from the time we found out that they were trying to get into the plant. It was practically every day discussion about the United Mine Workers.

Q. Who participated in the various discussions?

A. I could name you 15 or 20 girls.

Q. Just name a few of them.

A. I could name every girl on the conveyor at the time.

Q. In other words, all of the girls on the conveyor from time to time participated in these various discussions? A. Yes. [190]

Q. And I gather from that that all the girls on the conveyor were opposed to the Mine Workers effort?

A. Well, I don't know. They discussed it. Now, what their views were, I do not know individually.

Q. What was the tenor of the discussions?

Mr. Macomber: I'm going to object to that as calling for the conclusion and opinions of this witness. She can't tell about any individual discussions

(Testimony of Helen Irene Greenwood.)

and now counsel wants her conclusion as to the general tenor of the discussions. Of course, it's understood I have a running objection to all of this on the grounds of hearsay.

Trial Examiner: Yes, you have your running objection and for the record, the objection is overruled. I'm going to sustain the objection to the form of the question.

Q. (By Mr. Grodsky): Mrs. Greenwood, with reference to these various conversations, what did you say as to what could be done with reference to the Mine Workers?

A. I don't recall what I said.

Q. Well, do you recall having said anything at all?

A. I didn't like the idea of them coming in.

Q. Do you recall whether you made any discussion of what could be done—strike that.

Do you recall that you wanted to make them unwelcome? A. Yes.

Q. Do you recall whether you made any suggestions of what [191] should be done to make them unwelcome?

A. To give them jobs that they didn't like to do.

Q. And did you say why you thought that they should be given jobs that they didn't like to do?

A. Because I understood that was the only way that they would leave the plant.

Q. Now, on the date that Ann came to work and was assigned to work on the take-off job, had she had experience at that job before?

(Testimony of Helen Irene Greenwood.)

A. Not on that particular conveyor, no.

Q. Now, from what you say, I assume that if I asked you the question with reference to another conveyor the answer might be different?

A. Yes.

Q. Then, she did have experience on the take-off job on another conveyor? A. Yes.

Q. Do you know which conveyor that was?

A. No. 2 conveyor.

Q. Is that the middle sized conveyor, the one between the small and large?

A. It is the smallest.

Q. That is the smallest conveyor. You are not the leadlady on that conveyor, are you?

A. No. [192]

Q. You have observed her working there, is that it? A. Yes.

Q. Have you observed what work is done on that conveyor? A. On the No. 2 conveyor?

Q. Yes. A. Yes.

Q. What work is done on that conveyor?

A. They are wire stations, taping and take-off.

Q. Well, is that a final assembly conveyor the same as the No. 1 conveyor?

A. No, it's not a final.

Q. When they assemble at that conveyor, how large—strike that.

What is the final product called, is that called a harness?

A. The final, yes.

Q. No, I mean on the No. 2 conveyor.

(Testimony of Helen Irene Greenwood.)

A. It's called the first tape.

Q. How many wires, if you know, are there in the first tape?

A. Well, there's different tapes that have more wires than others. The majority of the tapes are around eight to ten wires in the first tape.

Q. And have you observed the jigs that they use on that table? [193]

A. Yes.

Q. What is the size of those jigs?

A. They are a smaller jig than on the No. 1.

Q. Have you observed the prongs in which they put the eyelets and they put the wires with reference to the No. 1 conveyor, are the number of prongs on the jigs on the No. 2 conveyor fewer in number?

A. Yes.

Q. Now, when Ann came to work on the conveyor on February 10, did you instruct her as to how the job should be performed?

A. No.

Q. Did you observe her in the performance of the job?

A. Well, as best I could at the time that she was brought on the conveyor. I was on the conveyor myself at the opposite end.

Q. How far, in terms of feet, were you from where she was?

A. Oh, I'd say about 25 feet, 20, somewhere along there.

Q. Did you observe whether she had gloves to work with?

A. She didn't right away, no.

Q. Do you know whether the girls who worked there customarily wear gloves?

(Testimony of Helen Irene Greenwood.)

A. At that station, yes.

Q. Why do they wear gloves?

A. To protect their hands.

Q. Have you observed what the nature of the work is with [194] reference to their hands?

Well, I will rephrase the question, it's a little awkward.

In removing the harness from the jigs, is it necessary to get the hands under all of the wires on the jig?

A. You don't necessarily get them under, you can pull the wires up. You don't have to get your hands underneath the jig.

Q. I mean underneath the wire?

A. Yes.

Q. Do those wires have rough edges at the point of contact? A. Not the wire, the pegs.

Q. Yes. And have you observed that when you try to pull up the wire that if it's slack, it's rather easy to pull up but that sometimes it may be pulled, the wire may be pulled tighter and it may be more difficult to pull up? A. Yes.

Q. And if it's more difficult to pull up the hands would tend to slide along the wire? A. No.

Q. Well, isn't it your experience in every-day life that when you want to pull something up—

A. You pull harder, yes.

Q. And if it is, if it doesn't give, your hand slides [194] along the wire?

Mr. Macomber: I'm going to object to the form of the question. It's leading and suggestive. This is

(Testimony of Helen Irene Greenwood.)

his witness, after all, and now he is arguing with her about the mechanics of this procedure and I suggest the question is leading and suggestive. And it is argumentative.

Trial Examiner: I will sustain the objection.

Q. (By Mr. Grodsky): I will rephrase the question, Mrs. Greenwood.

Have you observed that at times when the girls lift up the wire their hands tend to slide along the wire?

Mr. Macomber: I object to that as having been asked and answered.

Trial Examiner: I don't recall that it has been answered. The objection is overruled.

The Witness: No, your hands don't slide. They couldn't. You lift up. They aren't going to slide this way.

Q. (By Mr. Grodsky): On the day when Peggy Redden told you that Ann was being sent to your conveyor, what did you have in mind with reference to assigning Ann on the take-off job?

Mr. Macomber: I want the objection to be noted, I object to the form of the question. I think it calls for the conclusion and opinion of this witness which, insofar as it may be relevant at all, would be hearsay as to the [196] corporation and certainly not binding upon it in the absence of some proof that this lady was directed or being authorized in her activities by the corporation or lawful agent thereof.

What she had in mind is a private opinion good or bad and would not be binding upon the Essex

(Testimony of Helen Irene Greenwood.)

Wire Corporation without some further evidence that she was authorized on the behalf of the corporation.

Trial Examiner: Well, the general nature of the objection as to whether or not anything the witness said or did or thought is binding upon the company, my general ruling as expressed here yesterday will still apply that in the event on the part of General Counsel it fails to show any direct authorization or status on the part of Mrs. Greenwood from which authority to act could be inferred, the entire matter will slip from perspective as not binding upon the company.

With respect to the objection, insofar as it goes to a search of the witness' mental processes, the objection may be well taken insofar as the form of the question is concerned.

I will sustain it in that regard.

Mr. Grodsky: Mr. Examiner, I'm exactly seeking the witness' mental processes and I wish to argue the point that this particular juncture, her mental processes are material and are [197] relevant.

Now, I don't understand, if I'm in error on that, then, I am at a loss.

Trial Examiner: Her mental processes, as I view the matter, that very well may be material and relevant. However, I merely suggest that the question be rephrased, in an attempt to elicit more specifically from the witness either her mental process at

(Testimony of Helen Irene Greenwood.)

a particular time and in connection with a particular event or objective indications, if any, of what her mental process was.

Q. (By Mr. Grodsky): When you assigned Ann to the take-off job, did you have in mind the fact that she was a supporter of the Mine Workers?

A. Yes.

Q. What was the purpose of your assigning her to that job?

A. Well, we needed an experienced girl and I considered Ann experienced. They do have their—move the girls around in our department whenever we see fit.

Q. Did you consider the take-off job as a disagreeable job? A. No.

Q. Did you think that Ann would consider it a disagreeable job? A. Yes.

Q. Was that one of the reasons why you assigned the job to her? [198] A. Yes.

Q. Before February 10 of 1954, was there a lady by the name of Freda Totodo who had had the take-off job? A. Yes.

Q. And for how long a period of time had she had that job?

A. Two and a half to three years.

Q. When she was taken off that job, do you know why she was taken off?

A. A doctor's report.

Q. When she was taken off the job who was assigned to that job? A. Jo Hutchins.

Q. Did Jo Hutchins have that job at all times

(Testimony of Helen Irene Greenwood.)

after the date that she was assigned to it until February 10? A. Yes, that was her station.

Q. And was there a girl who would regularly relieve her at such times as she would need relief?

A. I don't understand your question.

Q. Well, there would be a time, or wasn't there times when she would have to leave the line?

A. Yes, the relief for the rest room, yes.

Q. And at such times was there a specific girl who would always step in and take her place?

A. Yes.

Q. Who was that girl? [199] A. Myself.

Q. You have worked that station then?

A. Yes.

Mr. Grodsky: No further questions.

Cross-Examination

By Mr. Macomber:

Q. I take it from your answers, the answer to some of the questions produced that your primary reason for putting Ann on the so-called take-off spot on the conveyor belt was because of her experience? A. Yes.

Q. And this matter of whether you thought she would deem it a disagreeable job was truly incidental to your motivation, or to your thinking, is that right? A. Yes.

Trial Examiner: Your answer is what?

The Witness: Yes.

Q. (By Mr. Macomber): I mean it was a pri-

(Testimony of Helen Irene Greenwood.)

vate sentiment but so far as you know, you and you alone enjoyed, is that right? A. Yes.

Q. You did not disclose that sentiment to any foreman at the time, did you? A. No.

Q. And had not previously discussed that sentiment with any foreman or any other responsible official as far as you [200] know of the Essex Wire Corporation? A. No.

Q. And you say, in fact, in answer to counsel's opinion, that is not a particularly disagreeable job, is that right? A. No.

Q. The Totodo woman who left the job was a woman 50 years of age, or thereabouts?

A. Approximately, yes.

Q. And had worked on that job how long?

A. Two and a half or three years.

Q. And did this Jo Hutchins, or did she not work uncomplainingly up until the 10th of February?

A. She requested that position on the conveyor.

Q. Jo Hutchins requested it? A. Yes.

Q. And as far as you know, worked continuously on it? A. Yes.

Q. Of whom did Jo Hutchins request that job?

A. Of the foreman.

Q. And as far as you know, had never complained? A. No.

Q. You had worked the job yourself?

A. Yes.

Q. And you hadn't complained?

A. No. [201]

(Testimony of Helen Irene Greenwood.)

Q. Have you cut yourself up in the job doing it?

A. I had a few scratches. We all have.

Q. You get that on other jobs, too?

A. Yes.

Q. You wouldn't go so far as to say that you had seen anything other than scratches, is that so?

A. That's right.

Q. On the morning of February 10 and prior to her departure from the job, did you hear any complaints from Ann Hamilton? A. No.

Q. No complaints from her at all?

A. Not to me.

Q. Did she request of you any gloves at any time? A. Not of me, no.

Q. Now, going back to the subject concerning which counsel inquired, to wit, whether you thought this was a difficult job, you said you didn't think it was a difficult job but you thought Ann would think it was a difficult job?

Mr. Grodsky: Disagreeable.

Q. (By Mr. Macomber): Disagreeable. You thought Ann would think it a disagreeable job. Can you amplify that statement and tell us what you had in mind?

A. They think the No. 1 conveyor is the hardest place in the plant to work and they just don't like to work on the conveyor because you work at it steady. You can't stop and [202] sit down. You keep working away. You couldn't have any, you just can't leave it when you feel like it to get a

(Testimony of Helen Irene Greenwood.)

drink of water or go to the rest room. You have to wait until you are relieved to go.

Q. How long have you known Ann?

A. Well, I don't recall how long she has been there. I have known her since she's been there at the plant. About a year, maybe a little less.

Q. Were you there when she was working on the conveyor sometime prior to the holidays, as you put it, I think? A. Yes.

Q. To refresh your recollection would that have been sometime prior to about December 15?

A. Yes, I believe so.

Q. Do you recall whether during any of the time prior to December 15 she had worked at all on any occasion on this so-called take-off station?

A. No, not on the take-off.

Q. There was from—not on the take-off station?

A. No.

Q. The woman who worked on that is the Totedo woman, is that correct? A. Jo Hutchins.

Q. Jo Hutchins? A. Yes. [203]

Q. Jo Hutchins worked there since when? Approximately, you don't need to give the precise date, approximately? A. I'd say four months.

Q. Is the experience that you get on that No. 1 conveyor whether on the take-off station, the wire station or the other station mentioned, is it transferable so that experience on any part of that conveyor is helpful on any other part? A. Yes.

Q. In other words, you deemed that such experience as Mrs. Hamilton had in connection with

(Testimony of Helen Irene Greenwood.)

that conveyor or a conveyor like it would be helpful on that so-called take-off job? A. Yes.

Q. Now, is there any particular skill, any particular skill, any great skill, let us say, involved in that take-off operation? A. No.

Q. While some experience, I take it, from your answer on that conveyor is helpful? A. Yes.

Q. No experience is necessary to operate that take-off station? A. No.

Q. Did you speak—strike that. [204]

As I understand it, you did not speak to Ann about coming on the job? A. No.

Q. Before she was directed there by her lead-lady, is that right? A. That's right.

Q. As I understand it, you learned or ascertained through your foreman that the repair girl was absent? A. Yes.

Q. And that Jo Hutchins who was on the job at that time had had previous experience at the repair table and thus it became necessary to move someone with such experience over to the repair table, is that right? A. Yes.

Q. Did you know that Jo Hutchins was such a person at that time, that is, she had had such experience on that repair table? A. Yes.

Q. Now, that repair table, I think in accordance with some previous testimony is about what, 60 feet away?

Trial Examiner: I believe it was estimated 90.

Q. (By Mr. Macomber): 90, give us your estimate, how far from that table is the take-off posi-

(Testimony of Helen Irene Greenwood.)

tion on the conveyor upon which Ann was working?

A. I'd say around 50 feet. [205]

Q. You would say around 50 feet. What is the general nature, the function at the repair table?

A. Repair the harnesses as they come around on the overhead conveyor. If there are any holes left in the tapings, any rubber sleeves worn off the terminals and if the terminals come off, they put them on, just the repair, if any, to do.

Q. Now, the taping machine upon which Ann was working at the time this all came about in making switches is located a relatively short distance from this conveyor, was it not? A. Yes.

Q. In terms of feet would you say it was any more than about 12 feet? A. About 15 feet.

Q. Well, there were no other taping machines between Ann and the conveyor, were there?

A. Two.

Q. Two other taping machines?

A. I think so, one or two.

Q. Do you recall who the girls were on those machines? A. Eunice Ford and Evelyn Wire.

Q. But neither of those girls, to your knowledge, had ever worked on the conveyor machines?

A. No.

Q. To refresh your recollection, couldn't you recall that Ann Hamilton had experience with the take-off operation on [206] the No. 2 conveyor machine? A. Yes.

Q. She did have?

A. She was on that station, if I'm not mistaken,

(Testimony of Helen Irene Greenwood.)

the day she asked me if I couldn't get her on the No. 1 conveyor.

Q. That was approximately when?

A. In the month of October or November, I don't really remember.

Q. In October she was working on the take-off station, is that right? A. Yes.

Q. Of No. 2? A. No. 2.

Q. And she personally requested you at that time to go over on the No. 1 conveyor?

A. Yes.

Q. And did she personally request at that time, that is, in October of 1953, that she be placed on the take-off station? A. Yes, on the conveyor.

Q. Didn't specify any particular job?

A. No.

Q. Or specify any abhorrence of the take-off job, as I take it? A. No. [207]

Q. So did you request that of your superiors that she come over there to your conveyor?

A. Yes. I told Mr. Kresin that Ann had asked to be put on the conveyor and that was the girls that he wanted on the conveyor were ones that wanted to be there.

Q. Were you always friendly to Ann?

A. Yes.

Q. With Ann? A. Yes.

Q. As a matter of fact, had you had any words with her up to this point? A. No.

Q. Had you ever had any disagreement up to this incident? A. No.

(Testimony of Helen Irene Greenwood.)

Q. That is, up to February 10? A. No.

Q. As I understand it, she never complained of any work she had done while on the No. 1 conveyor and prior to approximately December 15, 1953, when she went off the conveyor? A. No.

Q. Do you know of your own knowledge that at the time she went over to the No. 1 conveyor about December 15, 1953, that it was at that time contemplated she would be only temporarily moved to the conveyor? [208]

A. She was taken off for doctor's request.

Q. On a five-day absence?

A. That I don't know.

Q. You never had occasion to discuss that with Ann? A. No.

Q. Nor did you ever see the doctor's slip?

A. No.

Trial Examiner: If you are about to pass to another subject, I think that this might be a good point for a five-minute recess.

Mr. Macomber: It will give me a chance to go over my notes.

Trial Examiner: There will be a five-minute recess.

(Short recess taken.)

Trial Examiner: The hearing will be in order.

Q. (By Mr. Macomber): Inquiry was made regarding gloves for Ann Hamilton. Do you know who actually obtained the gloves for her this morning?

(Testimony of Helen Irene Greenwood.)

A. Betty Cave told the foreman that she needed gloves.

Q. The foreman was this Mel?

A. Mr. Kresin.

Q. And when were they obtained in point of time to Mrs. Hamilton's departure?

A. Well, I don't know for sure but I would say she received her gloves within 20 minutes from the time she [209] requested them.

Q. You say within 20 minutes of the time she requested them? A. Yes.

Q. Did you overhear her request gloves?

A. No.

Q. No request made of you. I take it that is an understanding you have based on hearsay?

A. Yes.

Mr. Grodsky: I move to strike that testimony because it is based on hearsay.

Trial Examiner: It will be disregarded.

Q. (By Mr. Macomber): But you did actually see the gloves handed to her and see her put them on? A. I saw her wearing them.

Q. Did you observe at any time prior to her departure blood running from her hands or deep gashes or horrible cuts or anything of that kind?

A. No.

Q. Did you see her hands? A. Yes.

Q. Did you see any scratches on them?

A. No.

Trial Examiner: The original question was, Mr. Macomber asked how long before the time she left

(Testimony of Helen Irene Greenwood.)

the station [210] that she got the gloves. You saw the gloves handed to her. Can you estimate how long that was?

The Witness: I did not see the gloves handed to her.

Trial Examiner: I thought you said you had?

The Witness: No, it was, I said I heard she requested the gloves and within 20 minutes that she had received the gloves.

Trial Examiner: The question——

The Witness: Then I saw her wearing the gloves but I didn't actually see her put them on.

Trial Examiner: From the time that you saw her wearing them to the time that she left the station, what period of time was that?

The Witness: Thirty minutes, 35.

Q. (By Mr. Macomber): Were you present when she actually left the job? A. Yes.

Q. Did she complain to you of any illness before leaving? A. No.

Q. Now, as her leadwoman on that job, would it have been and was it customary if she had anything disturbing her in the way of illness or otherwise, to report it back to you? A. Yes.

Q. And that is a sort of so-called standing operating procedure? [211] A. Yes.

Q. Did she report anything to you?

A. No.

Q. Or ascribe any reason at all for leaving the job? A. No.

Q. Did you thereafter follow her with your eyes,

(Testimony of Helen Irene Greenwood.)

did you see what she did? Just tell how she left if you saw her leave, what did she do, put down tools, walk off, that is the sort of thing I'm trying to get.

A. Well, she picked up her purse and gloves and I believe went back to the taping machine or to Loraine.

Q. Who is Loraine? A. Sister-in-law.

Q. Loraine Evans is her sister-in-law?

A. Yes.

Q. She is the other complainant in this matter?

A. Yes. And she and Loraine walked by me out toward the main door. [212]

* * *

Q. Now, I asked you a moment ago about this James Hamilton. James Hamilton is the husband of Ann Hamilton, according to your understanding? A. Yes.

Q. Do you know him to see him around the place? A. Yes.

* * *

Q. Now, do you remember or know the station to which Hamilton was assigned, what he did in the plant?

A. He was the shipping out clerk, I believe, or packer.

Q. And what was the general nature of the work he performed, can you describe it to the Trial Examiner?

A. He weighed the boxes and sealed the boxes and stamped the boxes.

(Testimony of Helen Irene Greenwood.)

Q. Now, after the drive started were there other people in the general area where he was employed, or around the [215] plant, who you came to know as members of the United Mine Workers?

A. Yes.

Q. Did you notice any change during working hours in the activity of this Hamilton?

A. I noticed he didn't work as hard as he had been and had left the station an awful lot.

Q. Did you observe him having these conversations and so forth with other people who are members of the United Mine Workers?

A. Yes, it seems that every time any friends went to the drinking fountain, he was right over there behind the boxes talking to them.

Q. And that started about sometime after the holidays or the first of the year, 1954?

A. Yes.

Q. Did he seem to circulate through the plant more often?

A. Well, he was on—yes. He was over on the other side, too.

Q. Did you see him from time to time talking to Loraine Evans?

A. Yes, he worked right near her.

Q. Loraine is what, she is related to him in some way or other, isn't she?

A. Brother and sister. [216]

(Testimony of Helen Irene Greenwood.)

Redirect Examination

By Mr. Grodsky:

* * *

Q. Where did Mr. Hamilton work with reference to your department?

A. Well, he worked at the other end which would be about 50, 60 feet up by the repair table is where he worked.

Q. His wife, Loraine, where did she work from where he was working—excuse me, his sister?

A. She worked 10 feet, I don't know, 8 to 10 feet from her brother.

Q. And before the time this Mine Workers activity came into the picture, did you have any particular reason to observe what Mr. Hamilton was doing? A. No.

Q. But after it came into the picture you knew he was active on that behalf, didn't you?

A. Yes.

Q. And you kept a special lookout for him, didn't you? A. Yes.

Q. And when you say that he spent more time talking to his sister after that than before, isn't it fair to say that you really don't know how much he spent talking to his sister before then?

A. I don't think I specified his sister. I think I said the ones that were in the United Mine Workers, that every time they came to the drinking fountain, J. C. was over there [230] talking to them.

(Testimony of Helen Irene Greenwood.)

Q. Now, I recall Mr. Macomber asking you whether you observed him talking to Loraine and I believe you answered it you observed him talking to her a great deal of time. A. Well, yes, he did.

Q. But you don't know if that was more time he talked to her before or less, do you?

A. I believe it was more after the United Mine Workers.

Q. On what do you base that opinion?

A. Because before when they weren't in there, there wasn't all of this talking in corners and going behind boxes and sneaking around.

Q. Isn't it a fact that before then you just weren't aware of him at all?

A. Yes, I was aware of him. I think the whole plant was aware of the Hamilton family.

Q. You mean before this activity?

A. Long before the United Mine Workers were there.

Q. Now, did you at any time report your observations about Hamilton to your foreman?

A. No.

Q. Did you report it to any representative of management? A. No.

Q. Did you discuss it with anybody, any representative of the company before today? [231]

A. Whether I had seen J. C. talking to Loraine?

Q. That you had observed, the testimony you have given here today about J. C. In other words, that you had seen him sneaking behind boxes and popping up at the drinking fountain.

(Testimony of Helen Irene Greenwood.)

A. No, I think I made my remarks to the committeewoman.

Q. You made your remarks to the committee-woman? A. Yes.

Q. That is Betty Cave? A. Yes.

Q. When did you do that, I mean was it at the time it happened, approximately?

A. Well, when it was known the United Mine Workers were in there.

Q. I show you General Counsel's Exhibit 2 and ask you if you have seen this notice posted on the bulletin board? A. No, I did not see it.

Mr. Grodsky: No further questions.

Recross-Examination

By Mr. Macomber:

Q. I gather when you say you haven't seen that bulletin and you have not, likewise, seen these company rules, I gather from a previous answer that you gave to your counsel that you are just not a bulletin board reader, is that it? A. Yes.

Q. You indicated that you sometimes casually glance at it [232] but you are not one of these people that stand and read bulletins and that sort of thing? A. No, I don't.

Q. And you were not telling this Examiner that that bulletin which was just handed you a moment ago or the company rules and regulations that were

(Testimony of Helen Irene Greenwood.)

previously submitted to you were not sometimes upon that bulletin board?

A. No, I did not see them.

Q. You just didn't see them? A. No.

Q. But there could have been a lot of things you didn't see? A. Yes.

Q. And you are not suggesting by any of your answers that they were not there? A. No.

Q. Now, your counsel asked you about these people sneaking around corners and going behind boxes and that sort of thing. Did you notice that United Mine Workers on company time and on company property sneaked behind boxes and around corners after this organization campaign or whatever it was started the first of the year thereafter?

A. You mean are they still doing it?

Q. I don't care about whether they are still doing it. I can take it or leave it. Were they still doing it back in [233] February of 1954?

A. Yes.

Q. And that would occur during company hours, is that right? A. Yes. [234]

* * *

ALEXANDER GORDON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. State your name and address.

A. Alexander Gordon, 2536 University Avenue.

Q. Mr. Gordon, what is your position at Essex Wire? [244]

A. In charge of inspection.

Q. And was Loraine Evans employed in the department in which you were foreman?

A. Yes.

Q. Is your title foreman?

A. I'm a foreman, actually, yes.

Q. How long were you Loraine's foreman?

A. For about 14 months, I guess.

Q. And is that until the time that she was discharged?

A. Yes. [245]

* * *

Mr. Macomber: There is one thing I would like to call to the Examiner's attention at this time while I think of it and it's Article 4 of the contract in effect during the year 1954 and I assume that the same provision was in the 1953 contract and I read it at this time only as it bears upon the testimony of one of the witnesses to the effect that there was some union representative—I have forgotten his name—Sienco in there at some time working on company property.

Article 4 is as follows:

“Union representatives properly accredited to the

company by the union shall have access to the plant for the purpose of contacting committeemen and/or employees through arrangement with the personnel department.

“The company shall not impose regulations which will have the effect of excluding the union representative from the plant of the company or of rendering ineffective the intent of this [263] provision.”

* * *

ELIZABETH ANN HAMILTON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. Will you please state your name and [264] address?

A. Elizabeth Ann Hamilton, 269 San Jacinto Street.

Q. Speak up, please, and look over toward where Loraine is and it will be easier for you to speak up.

When did you work in the plant, when did you start working?

A. Last part of May.

Q. Of 1953?

A. Yes, sir.

Q. And you worked there until February 10 of 1954?

A. Yes, sir.

Q. What was your job when you went to work at the plant?

A. Taper.

Q. That is a taper on the taping machine?

(Testimony of Elizabeth Ann Hamilton.)

A. Yes.

Q. During the time that you were working at the plant, did there come a time when you became interested in the activity on behalf of the United Mine Workers? A. Yes, sir.

Q. And what activities did you partake in?

A. Well, having cards signed and visiting people's homes at night.

Q. When you visited people's homes at night, did you do that yourself or in company with someone else?

A. In company with someone else. [265]

Q. With whom else did you go?

A. Loraine Evans, my husband and Mrs. Evans' husband.

Q. Did you all four go at the same time or did you just go at different times with different ones of these people?

A. Well, the largest part of the time it was with Mrs. Evans, myself and her husband.

Q. These visits that you described were made to employees' homes? A. Yes, sir.

Q. During what month or what months did these visits take place? A. December, January.

Q. Did there come a time when you put on a union button? A. Yes, sir.

Q. Do you know the date on which you put on a union button? A. February 8.

Q. And why are you sure of that date?

A. Well, I remember the date because I asked and talked to the Mine Workers' representative who

(Testimony of Elizabeth Ann Hamilton.)

was Al Sabatino and he said we could wear it. That was on a Sunday.

Q. Did you make a special note of the date?

A. Yes, I did.

Q. How did you make a note to remember it?

A. Well, Mr. Sabatino suggested to us that we keep little notes in books on things that happened at different times that [266] we thought might be of importance sometime.

Q. Did any representative of management talk to you about your wearing the union button?

A. Yes, sir.

Q. Who was the first one and when did he or she talk to you?

A. Kenny King on February 8.

Mr. Macomber: Who is Kenny King?

Mr. Grodsky: Kenny King is general foreman.

Q. (By Mr. Grodsky): Where did that conversation between you and Mr. King take place?

A. My taping machine.

Q. What time of the day was it?

A. It was in the morning. I don't remember the exact time.

Q. Was anyone else present who could hear the conversation? A. No, sir.

Q. Now, what did Mr. King say to you and what, if anything, did you say or do on this occasion?

A. He came to me and he says, "Ann," he says, "have you read or have you heard of the notice that Mr. Simon had posted on the bulletin board

(Testimony of Elizabeth Ann Hamilton.)

that there was to be no campaigning on company time or property?"

And I says, "I'm not campaigning on company time or property."

He said, "You are wearing a badge."

I said, "Well, I'm still not campaigning." [267]

And he said, "Well, you'll have to take that badge off."

And I said, "I didn't see why I'm not allowed to wear my badge if other people are."

He said, "Well, we think you are campaigning and you have to take your badge off."

And he left me.

Q. Did there come a time after that when you put your badge back on? A. Yes, sir.

Q. Now, you describe it as a badge, what was it?

A. It was a United Mine Workers pin.

Q. About how large was the pin?

A. Oh, a little bit larger than a 50-cent piece.

Q. And when you told Mr. King about the other people wearing their buttons or badges, to what did you have reference?

A. To the IAM badges.

Q. Did he at that time say anything with reference to them wearing the IAM badges to you?

A. No.

Q. Did there come a time after your conversation with him that you put back on your button?

A. Yes, I did.

Q. When did you put it back on?

A. On the 10th of February. [268]

(Testimony of Elizabeth Ann Hamilton.)

Q. Did you have any conversation with any representative of management after you put the badge on on the 10th? A. Yes, sir.

Q. With whom did you have such conversation?

A. Mel Kresin.

Q. Was he your foreman at that time?

A. Yes, sir.

Q. Where did that conversation take place?

A. At my tape machine.

Q. About what time of day was it?

A. I don't know the exact time. I do know it was in the morning.

Q. Well, during the course of that morning, we have had lots of testimony about this, you were transferred from that job on the taping machine to another job on the rotary conveyor?

A. Yes, sir.

Q. Was your conversation with him before you were transferred? A. Yes, sir.

Q. About how long before you were transferred would you estimate the conversation took place?

A. I will say approximately 10 to 15 minutes.

Q. What did Mr. Kresin say to you and what did you say to him? [269]

A. He came up to me and he says, "Ann, I don't want you to start any fussing or fighting back in the plant about wearing your badge."

I said, Mel, I'm not going to say anything to anyone. If anything is said, they will say it to me."

He says, "Well, you will have to take that badge off."

(Testimony of Elizabeth Ann Hamilton.)

Q. So what did you say and do?

A. And I left my badge on and he walked away.

Q. Did you tell him why you were not taking the badge off?

A. I just said the other people were wearing theirs, the same as I told Mr. King.

Q. Did he make any comment about that?

A. No.

Q. Now, you have told us that at about some time after this conversation you were assigned to a job on the rotary conveyor, is that correct?

A. Yes, sir.

Q. How did you learn about your assignment to the rotary conveyor? A. My leadlady.

Q. Who was your leadlady?

A. Peggy Redden. [270]

* * *

Cross-Examination

By Mr. Macomber. [282]

* * *

Q. Did you sometime in the latter part of the year, 1953, ask Helen Greenwood or suggest to her that you would like to go over on No. 1?

A. I said I would like to work over there.

Q. You told her that, did you?

A. Yes, I did. [297]

* * *

Q. Why did you want to go over to No. 1. What was there about it that made it attractive to you at

(Testimony of Elizabeth Ann Hamilton.)

that time? A. Nothing in particular.

Q. Were you dissatisfied with the people with whom you were working on No. 2?

A. I have never been dissatisfied with anyone I work with.

Q. That goes with No. 1, too?

A. Yes. [298]

* * *

Q. Did you sometime on or about December 15, 1953, have some difficulty which impelled you to go to the doctor and ask to be relieved or to be taken off that job for a week or so?

A. I didn't ask to be taken off, no. The doctor said that.

Q. I will show you a slip which I will refer to as—I will ask you to look at, read and examine Respondent's No. 3 for identification. Just look at it and examine it. [300]

A. Yes, I know when I got this.

Q. And did you tell the doctor at that time that you had some respiratory infection, backache, and that you wanted to be taken off for approximately one week?

A. I didn't tell him. He told me.

Q. I notice the language, a statement asking for relief from the conveyor belt for approximately one week. Do I understand that you did not make that request?

A. That is true. I thought you meant did I ask the foreman to be taken off.

(Testimony of Elizabeth Ann Hamilton.)

Q. You did ask the doctor to be taken off for a week?
A. For a week, that's right.

Q. But at that time the only reason you requested to be taken off was because of this difficulty that you were suffering as a matter of health, is that right?
A. That is true.

Q. You had no difficulty or dissatisfaction on the job?
A. No. [301]

* * *

Q. Up until February 8, 1954, did you see any buttons, that is, union buttons exhibited around the plant?
A. Yes, sir.

Q. What buttons did you see exhibited around the plant prior to the 8th day of February?

A. IAM buttons.

Q. Did you see any United Mine Workers buttons prior to that day? [303]
A. No, sir.

Q. I take it that at least up until February 8, 1953, I take it that up until February 10, 1953, your relationship with the girls on the conveyor belt No. 1, was entirely amicable?

A. I wasn't around them any length.

Q. You had had no disagreement?

A. No, I had no disagreement with anyone.

Q. There had not been any friction, nothing of that kind?
A. No.

Q. As I understand it, February 9th was a Sunday?
A. No.

Q. What day was February 10, what day was it?

A. Wednesday.

(Testimony of Elizabeth Ann Hamilton.)

Q. On a Wednesday. I understood you to say a little while ago on February the 9th, you consulted with Al Sabatino?

A. I didn't mention any dates.

Q. Let's see, I think you said on a Sunday you consulted with Al Sabatino?

A. That's right, but I didn't mention any dates.

Q. That is right. On February 8 you put on your button, your campaign button? A. Yes.

Q. Right? A. Yes. [304]

Q. Your union button? A. Yes.

Q. It was on a Sunday, immediately proceeding that that you talked to Al Sabatino, right?

A. On the 7th.

Q. Where was that conversation had with him?

A. Well, I talked to him in different places, not just one place.

Q. Several different places?

A. That's right.

Q. Can you give us any particular place or places that you had these discussions with him?

A. One place was at my own home, one place at Johnny Sexton's.

Q. Any other places?

A. My sister-in-law's.

Q. Is that when he told you to keep a notebook in case something developed?

A. No, not that day.

Q. When was it that he told you that you were to keep a notebook?

A. When we first started.

(Testimony of Elizabeth Ann Hamilton.)

Q. When you first started? A. Yes.

Q. When did "we first start"? [305]

A. When did we first start campaigning?

Q. Yes.

A. Oh, it was approximately somewhere in December. I won't mention any dates because I'm not positive.

Q. Did you keep a notebook? A. I did.

Q. Do you have that notebook with you?

A. Yes, sir, over there.

Q. What did you report in that notebook?

A. Incidents that happened to me each day. Anything that happened, I wrote it down.

Q. Did he tell you what the purpose of keeping that notebook was?

A. He said in case something happened, always have your notes.

Q. Did he suggest to you what might happen?

A. No.

Q. Did he suggest that there might be some difficulty, plant difficulty arise out of your activity?

A. Yes.

Q. And that you ought to have a record so that you could justify yourself if it came to that?

A. If it came to that, yes.

Q. Where did you keep that notebook during the day that you were on the job? [366]

A. I kept it at home.

Q. You go home at night, would you, and if there was any incident or incidents, would you write those incidents down? A. I would.

(Testimony of Elizabeth Ann Hamilton.)

Q. And would you say that there were no incident or incidents prior to February 8, 1954?

A. That's right.

Q. So that notebook, as far as reporting anything, was totally blank up through and including February 8, 1954, is that correct?

A. Not including February 8, no.

Q. But excluding February 8, 1954, you had a blank notebook, is that right?

A. That's right.

Q. But after you talked to him on Sunday in these several discussions and he told you to put on your union button, that is when you really started writing in that book, is that right?

A. That's right.

Q. And now, on February 8, that is when you put your button on?

A. That's right.

Q. And did you write down in that book that you had had a conversation with one of the foremen regarding the button? [307]

A. Yes, sir.

Q. Were there any other incidents on February 8 other than this conversation which you say relates to the button?

A. No, sir.

Q. Did you wear the button on that day or did you have it in your hand or what were you doing with the button?

A. I wore it until I was told to take it off.

Q. How long was that?

A. I don't know exactly how long it was.

Q. And then on February 9, were you at work?

(Testimony of Elizabeth Ann Hamilton.)

A. Yes, sir.

Q. You did not wear your button on February 9?

A. No, sir.

Q. Why did you not wear it on the 9th?

A. Because I was told the day before to take my button off and the reason I put my button on again was because I consulted with Mr. Sabatino whether it was right, whether we could wear our buttons or not, and he said it was and that is why I put it on.

Q. If I understood you correctly, and correct me if I am wrong, I don't want to misquote you. Mr. Sabatino told you on Sunday on one of several conversations with you that you were to wear the button on Monday? A. That's right.

Q. Did he tell you at that time that it was all right to [308] wear your button?

A. We didn't ask and he didn't say.

Q. On Monday you talked to him again, is that right? A. On Tuesday.

Q. On Tuesday? A. Yes.

Q. Did he tell you by phone or in conversation with him?

A. In a conversation at my own home.

Q. How many times did you see him on the 9th?

A. One time.

Q. Now, then, as I take it, except for this incident involving the button which occurred on the 9th of February, you had had no trouble with any of your co-workers on the job, is that right?

A. That's right.

(Testimony of Elizabeth Ann Hamilton.)

Q. Up through and including February 9th except for this incident involving the button, the conversation you had with the foreman relating to that subject, you had had no trouble with management so to speak or any of the representatives of Essex Wire Corporation?

A. No one except Mr. King.

Q. That had to do with this button?

A. Yes. [309]

* * *

Q. Of that approximate 16, how many of them would you say laughed and giggled?

A. The ones I had seen, I would say four girls directly across that I could see.

Q. The rest were not?

A. I wouldn't know.

Q. Helen Greenwood wasn't laughing or giggling, was she?

A. She was laughing.

Q. Appeared to be laughing at you?

A. She was looking at me.

Q. Was Peggy there at that time?

A. No.

Q. Did she ever laugh and giggle at you? [311]

A. That I couldn't say. I didn't watch her.

Q. How long did they continue to laugh and giggle at you before the break period?

A. Up until the break period.

Q. Was there continuous laughing and giggling on the part of three or four girls?

A. I didn't watch them all the time. When I seen them, they was laughing and giggling.

(Testimony of Elizabeth Ann Hamilton.)

Q. Did anyone say anything to you?

A. No, nobody said anything to me at all.

Q. Did you say anything to them?

A. I didn't say anything to them, no.

Q. Did you ask what they were laughing at, giggling at?

A. I didn't have time.

Q. Where were these girls working in relation to you?

A. Right across, as far as from me to you. [312]

* * *

Q. You were concentrating on your work at that time?

A. Trying to figure out how to do it.

Q. Did the giggling disturb you?

A. Yes, it did.

Q. Did you say anything to either your leadlady or committeewoman about that giggling?

A. They weren't around there at that time.

Q. Where was Helen Greenwood?

A. Working on the opposite side with the tape girls relieving.

Q. When you left at the break period, you didn't tell Helen about any giggling, did you?

A. No, because I didn't see Helen.

Q. Where was Helen at the time of the break?

A. I had no idea where she was.

Q. Up until the time of the break period, she was working [313] on the conveyor with you, wasn't she?

A. Not with me, on the side of me.

Q. With the same number of girls, whatever that number was, she was right there?

(Testimony of Elizabeth Ann Hamilton.)

A. Yes.

Q. Did you inquire of her or for her during the break period? A. No, I didn't.

Q. Did you speak to Peggy during the break period? A. No.

Q. Did you inquire of her or for her before you left?

Trial Examiner: Which Peggy is this?

Mr. Macomber: Peggy Redden, she's the committeewoman, isn't she?

Mr. Grodsky: No, Betty Cave.

Q. (By Mr. Macomber): Peggy Redden is one of the leadwomen, she's leadwoman on the taping machines? A. Yes, sir.

Q. The Greenwood woman was leadwoman on the conveyor machine? A. That's right.

Q. Now, normally, and I use that word "normally" with apology, normally, if some difficulty comes up in connection with a job don't you and isn't it customary to report that difficulty to the leadwoman? [314] A. Not always.

Q. Well, do you some of the time?

A. Some of the time.

Q. In other words, if a job isn't going well and there's a leadwoman in charge of it, she's the woman whom at least some of the times you would report your difficulty to? A. That's right.

Q. Is it part of your job to straighten out those difficulties so far as you are advised?

A. So far as I'm advised, I believe so.

(Testimony of Elizabeth Ann Hamilton.)

Q. During all the time that this giggling was going on, where was the foreman?

A. I have no idea where he was.

Q. He wasn't immediately around, in any event?

A. I don't know whether he was or not.

Q. Well, if he was, you didn't see him?

A. That's right.

Q. No other official of the Essex Wire Corporation was immediately around during this giggling period that you can recall? A. That's right.

Q. Now, as I understand it, you were nervous at the break period, right? A. Right.

Q. And you were nervous almost to the point of tears? [315] A. I was crying.

Q. And the first one to whom you spoke about leaving was whom? A. Mel.

Q. And where was Mel when you spoke to him?

A. He was between the coffee tables and the water fountains.

Q. And you told him in these words substantially when you saw him at the point last mentioned, "I would like to go home," is that right?

A. That's right.

Q. That is what you said to him? A. Yes.

Q. You did not tell him that the girls were giggling at the table? A. No, I didn't.

Q. You did not tell him that your hands were bleeding? A. No.

Q. You did not tell him that you were having any difficulties, any dissatisfaction with the job whatsoever? A. No, I didn't.

(Testimony of Elizabeth Ann Hamilton.)

Q. The only thing, as I understand it, you said to him was that you were not feeling well or something of that kind.

A. I just said I would like to go home.

Q. You would like to go home and he told you that you would have to see the nurse, did he [316] not?

A. He said, "If you are sick, go see the nurse."

And I said, "What is wrong with me the nurse cannot help."

And that is all that was said.

Q. You didn't say anything else to him?

A. I asked him for my slip to go home.

Q. But you didn't tell him anything about all the difficulty you had been having at the conveyor belt?

A. At the time I was too nervous and upset.

Q. And that is the only explanation you have for not telling about any difficulty that you had at that conveyor belt?

A. That's right.

Q. But you did say to him, "Don't I have to have a slip in order to go home," right?

A. That's right.

Q. And he told you that, you say, that he would fill out a slip for you and that it would not be necessary?

A. He said he would fill out the slip and hand it in for me.

Q. Notwithstanding that, you went over to the nurse's office, if I understand your testimony correctly?

A. Not after that, no.

(Testimony of Elizabeth Ann Hamilton.)

Q. Did you go at all to the nurse's office?

A. I didn't go to the nurse's office at all. I went to [317] the coffee room where the nurse was.

Q. She was there? A. Yes.

Q. Did you tell her anything about your hands?

A. I just asked her where Mrs. Barnes was and she said she had left for the rest of the day and I asked her where Mel was and she said she didn't know.

Q. You did not ask the nurse for a slip of any kind? A. No, I didn't.

Q. And report any nervousness or things of that kind, did you? A. No, I didn't.

Q. And after you had that conversation with the nurse, did you go back and talk to the foreman or did you just go home from that point?

A. You mean after I talked to the foreman, did I go to the nurse?

Q. I understand you first talked to the foreman?

A. No, I talked to the nurse before I talked to the foreman.

Q. Let me see now, when you first left the job, did you talk to the nurse before you talked to the foreman at any time? A. That's right.

Q. Now, you went out to the nurse, you asked the nurse [318] where Mrs. Barnes was, she said Mrs. Barnes was out taking care of somebody's family, something of that kind?

A. She said she wasn't there for the rest of the day.

(Testimony of Elizabeth Ann Hamilton.)

Q. Then you went out and sought out Mel and talked to Mel and had this conversation which you just told us about? A. That's right.

Q. And with that you went out of the plant, is that right? A. That's right.

Q. And talked to no one else whatsoever?

A. Just my sister-in-law as I passed the table.

Q. I see. And you didn't complain in any way about the difficulty you had at the table up to the moment you left the plant, is that right?

A. That's right.

Q. And then you came back, as I understand it, the next morning and reported for work and your card was gone? A. That's right.

Q. And that is when you went in and you had the various conversations that you have reported with these other people regarding your termination, is that right? A. That's right.

Q. Now, when you talked, when you returned the next day, the first one you talked to, as I understand it, was Mel, is that right?

A. Mrs. Barnes. [319]

Q. Mrs. Barnes told you you would have to go and see your foreman? A. That's right.

Q. You didn't tell Mrs. Barnes, did you, about your cut hands or about the difficulty you had on the job? A. No, not at that time.

Q. Then you went over and did you see Mel?

A. Yes.

Q. Where was Mel when you saw him?

A. Right by the coffee table.

(Testimony of Elizabeth Ann Hamilton.)

Q. And when you talked to Mel, what did he say to you?

A. I asked Mel where my timecard was and why it had been pulled and he told me that I had left without permission and I said, "Well, Mel, you told me that you would fill out the slip and hand it in for me."

And he says, "You ought to know I can't do that."

And I said, "How am I supposed to know you can't do that?"

And he said, "I know nothing about it. You have to see Mr. Harms."

Q. And that was the full conversation you had with him? A. That's right.

Q. And then you went to see Mr. Harms, is that right? A. That's right, 8:00 o'clock.

Q. Did you tell Mr. Harms at any time about the [320] difficulty you had at the table?

A. I tried to explain to him what had happened the day before, the same conversation with Mel and everything and he said, "Well, from what we understand, you walked off the job."

Q. What did you tell Mr. Harms when you saw Mr. Harms? He's the last man in this chain, tell us to the best of your recollection what conversation you had with Mr. Harms.

A. He took me in the nurse's office. No one was there except him and I and I said, "Mr. Harms, I'd like to explain what happened yesterday."

And I told him the same thing.

(Testimony of Elizabeth Ann Hamilton.)

Q. I want you to tell me what you told him.

A. I said, "Mr. Harms, yesterday I asked Mel if I could go home and he said to me, 'What's the matter, are you sick, if you are, go to the nurse.' And I told him what is wrong with me the nurse cannot help. He says, 'I hate to see you go.' I said, 'Don't I have to have a slip in order to be able to leave the plant,' and he said, 'I will fill it out and hand it in for you.'"

Now, that is the same words I told Mr. Harms.

Q. Did you have any further conversation with Mr. Harms? A. Yes, I did.

Q. Tell us about it?

A. He said, "Well, as far as we are concerned, you walked off the job." [321]

And I said, "Mr. Harms, I didn't walk off the job."

And he said, "Well, we think you did."

And I said, "In other words, I don't have a job."

He said, "That's right." [322]

* * *

Q. Then, as I understand it, up until the time you filed these charges, you never told the foreman, Mr. Harms or anybody, as a matter of fact, connected with the Essex Wire Corporation about any difficulty you had on machines with these girls?

A. No.

Q. Nor made any complaint about the gloves except the complaint you made while on the job?

A. That's right.

(Testimony of Elizabeth Ann Hamilton.)

Q. You told us when you left the job your hands were all scratched, they were bleeding and hurting very much? A. Yes.

Q. When you walked over to the nurse and talked to her, were your hands then bleeding?

A. Yes.

Q. Were they then scratched? A. Yes.

Q. Were they then hurting very much?

A. Yes.

Q. You are aware, of course, that the Essex Wire Corporation has a first aid station or first aid facilities? A. Yes.

Q. For scratched hands, right?

A. Yes, sir.

Q. For cut hands. I assume you never consulted a doctor [323] about those hands?

A. No. [324]

* * *

Redirect Examination

By Mr. Grodsky:

Q. Now, I believe, Mrs. Hamilton, that you went to Los Angeles to the Board's office and filed a charge shortly after this incident took place?

A. Yes, sir.

Q. Do you recall the date on which you went up to Los Angeles? [326]

A. I believe it was on the 12th of [327] February.

* * *

(Testimony of Elizabeth Ann Hamilton.)

Recross-Examination

By Mr. Macomber:

Q. You told us, I believe, you thought that Jo put her gloves away, put them in her pocket or something of that kind when you came on to the job, is that right?

A. I said she put them in her pocket, yes.

Q. And you told the Examiner in response to an inquiry just made to you by him that once an issuance was made of this kind, it was the practice of the individual to whom they were issued to keep them, is that right?

A. Are you talking about the gloves?

Q. That is what the Examiner was talking about generally. He said it was the practice to keep gloves once they were issued to you and I understood your answer to be yes, that was it, once there was an issuance of gloves or anything like that—well, I will limit the question to gloves—it was the practice of the persons to whom issued to keep them, wasn't it?

A. That's right.

Q. So when she put gloves in her pocket there wasn't anything unusual about that, was there?

A. No, I wouldn't say.

Q. Now, up until that point, if I understand from your [338] previous answers, you got along with that Jo all right, hadn't had any words or trouble with her?

A. Hadn't had any words with anyone.

(Testimony of Elizabeth Ann Hamilton.)

Q. You didn't ask them when you come over there, you didn't say, "Jo, let me take your gloves," nor, "I need your gloves," or anything of that kind, did you? A. I didn't have time.

Mr. Macomber: That is all.

* * *

LORAIN EVANS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

* * *

Q. When did you work for Essex Wire Corporation? [339] A. April 2, 1953.

Q. Until what date? A. June 4, 1954.

Q. That is, until June 4, 1954?

A. That's right.

Q. In what capacity were you employed?

A. Inspection department checker.

Q. And during the course of your employment, did you become interested in activity on behalf of the United Mine Workers? A. Yes, I did.

Q. In connection with that, did you sign up employees on cards? A. I did.

Q. And did you on occasion go out and pay calls to employees after work? A. I did.

Q. In the evening? A. I did.

(Testimony of Loraine Evans.)

Q. With your sister-in-law? A. I did.

Q. And with your brother and your husband?

A. I did.

Q. Among the employees who were interested in the United Mine Workers, did you have some kind of title in the plant? [340]

A. Yes, I was appointed their chairman.

Mr. Macomber: What? I didn't get that.

The Witness: The chairman.

Q. (By Mr. Grodsky): Do you recall the date when the employees were wearing union buttons?

A. Yes, I do.

Q. On behalf of the Mine Workers?

A. Yes, I do.

Q. And on the first date that they were, that the employees were wearing buttons, did you have a button? A. No, sir, I didn't.

Q. Did you have any conversation with any representative of management concerning buttons?

A. Yes, I did.

Q. And who was the first representative of management with whom you had a discussion?

A. Well, the first, it wasn't concerning the buttons. My first discussion was with Mr. Simon but it wasn't concerning the buttons.

Q. When did you have a discussion with Mr. Simon?

A. This time about Goldie. Goldie Riggins carried J. C. into the office to Mr. Simon.

Q. And that was the discussion about which

(Testimony of Loraine Evans.)

your brother, J. C. Hamilton, testified earlier in this proceeding? A. Yes. [341]

Q. Were you present at that discussion?

A. No, sir.

Q. How long after that discussion did you have a discussion with Mr. Simon ?

A. I guess it was about 15 minutes later.

Q. Where did you have your discussion with him? A. In Casey's office.

Q. And who was present?

A. Just Mr. Simon and myself.

Q. What did you say to Mr. Simon and what did he say to you?

A. I went in to explain——

Mr. Macomber: I'm wondering if we can have the approximate date?

The Witness: I don't remember the date.

Q. (By Mr. Grodsky): Can you tell us when it was with relation to when you terminated?

A. It was in February, early February.

Q. What did you say to Mr. Simon and what did he say to you on this occasion?

A. I explained to Mr. Simon that the girl J. C. had the argument with was the same girl cussed me out in the hall and I also told Mr. Simon, I told him about the petitions passing around out on company time and I asked him why we wasn't allowed to see those petitions and sign those petitions if we [342] wanted to.

Q. And what did Mr. Simon say to you?

A. At the same time, before Mr. Simon answered

(Testimony of Loraine Evans.)

me on that, Tom Walton, Mr. Tom Walton, he stuck his head in the door at the same time. He heard me say the petitions and he said to Mr. Simon, "That is exactly what I was going to tell you, just what she had said."

So he turned and walked out of the office, he left.

Mr. Simon told me he knew about the petition, he had a whole stack of them in there but didn't know what he was going to do with them.

Q. Did you ever see those petitions?

A. I saw the petition, but I couldn't read them. They wouldn't let us read them or sign them.

Q. Do you know what the contents of the petition was?

A. I saw one girl sign a petition directly in front of me. She told me, I asked her what it was. She said they told her to tell it was a T.V. program.

Q. Were you told by Goldie Riggins or anybody else whom you observed passing around the petition what the petition was?

Mr. Macomber: "Told by Goldie Riggins," I'm going to object to that as hearsay.

Trial Examiner: The question, the bare question is whether she was told, not what she was told. I will permit the question. [343]

The Witness: I did go to Goldie and ask Goldie about it. She is supposed to be a committeewoman.

I said, "Goldie, I understand the petition is supposed to be about the union working conditions, about the job and I feel all of us are entitled to sign if it is."

(Testimony of Loraine Evans.)

Goldie says,——

Mr. Macomber: I'm going to object to what Goldie said.

Mr. Grodsky: I am trying to get what the fact is and not saying the respondent is bound by this particular conversation at this point. This goes to shed light on her conversation with Mr. Simon.

Mr. Macomber: With that understanding, I have no objection.

Trial Examiner: Very well.

The Witness: She told me that it was only for the people that attended the union meeting that night were the people that were allowed to sign the petition.

Q. (By Mr. Grodsky): When you spoke to Mr. Simon and he told you he had a lot of petitions, was there anything further said in that discussion?

A. Yes, I had told him about the way the people was treating us out there and about this particular girl and I told him and he asked me if I ever brought it up to the union to the IAM about the problem and I said, "Yes, I have, several times." And I said, "They tell me that I cannot sign a grievance [344] against them."

So he says to me, "I don't care what they tell you. Any time anybody does anything to you, you come in here to sign that grievance and I will see that you sign a grievance."

Q. Was that the end of that conversation?

A. Yes. [345]

(Testimony of Loraine Evans.)

Q. (By Mr. Grodsky): Now, there has been testimony here that you engaged in conversation with your brother or, more accurately, that your brother engaged in conversation with you at your work station.

Did you engage in conversation with him?

A. No, sir.

Q. At any time?

A. No, sir, the only time I would ever speak to him on anything, we—relief break, that is up to the repair girl and myself to relieve each other if we had to go to the rest room or anything and the onliest thing I ever asked him, I always had my coffee cup and I'd go ask him if he would please get me a cup of water. [355]

* * *

Q. Now, had you been talked to by any representative of management on more than that one occasion that you testified about before you were discharged about arguing and so forth?

A. This one time I was with this girl. She cussed me out——

Mr. Macomber: May we know when that was?

The Witness: I don't remember the date. I definitely don't but I know the name, Jean Rooney, and it was after October. And I guess maybe talk was going around in the shop about the union and other people were talking about it, too. Anyway [373] before——

(Testimony of Loraine Evans.)

Trial Examiner: Before the holidays in 1953 or after?

The Witness: It was before. It was, I wouldn't say before or after, I don't remember but I do know at the 10:00 o'clock break she jumped me out in the hall.

She said to me, "Listen, God damn it, if you don't like the company and the union, why don't you get the hell out from here?"

And I says, "What are you talking about?"

And she said, "You heard what I said, causing the girls trouble out there."

And I says, "Who?"

And she says, "Never mind, just girls."

And I said, "I don't know what you are talking about."

And Mel Kresin was in the office using the phone and I opened the door and I said, "Mel, please straighten this girl out here."

And he said, "I'm on my break."

And I said, "This girl is cussing me. I don't know what she is talking about. Please straighten her out."

And he said, "O.K., in a minute."

So she left, but Mel, I don't see how he could miss hearing her cussing me. She left after the break.

Mel got Alex and we all went in the office, Mel, myself, her boss did and Goldie Riggins and my committeewoman. We went in the office and she

(Testimony of Loraine Evans.)

sat in the office and admitted [374] saying that to me.

And I asked, "What reason do you have saying this to me?"

I said, "Jean, I never spoke to you. I have never done anything to you. Why did you say that to me?"

I said, "I'm going to hear why you said that out there. You don't jump on me for nothing. If I do something, you jump on me. Otherwise, you don't jump on me."

Now, someone told Mr. Simon and Alex come out after me to go to Alex's office and talk to Mr. Simon. I went in there and Mr. Simon asked what it was about and I told Mr. Simon.

Q. (By Mr. Grodsky): Did Mr. Simon make any remarks?

A. Mr. Simon said he didn't allow a man to cuss in here let alone a woman.

Q. Was there any other occasion besides these two about which you have testified when you were talked to by management with reference to any arguments?

A. No, when I was first put on inspection over there, right away, those girls started giving me a bad time. And I went to Kenny King.

Trial Examiner: Which girls?

The Witness: The repair girls, two inspectors and the packers. Dorothea Randall and another girl by the name of Georgia and a girl by the name of Dolly. When I went over there they hollered out to

(Testimony of Loraine Evans.)

me on Saturday, "I wish I could work for Scotty." I ignored them, didn't pay any attention [475] to them and they put me on small parts that day.

Trial Examiner: Scotty was whom?

The Witness: Scotty was my boss before Alex was.

And so I worked all day that Saturday and came in on Monday and when I came in on Monday Scotty told those girls about breaking me in over there and teaching me everything and I was to be a relief girl for girls who go on a vacation, out sick. I was to be a relief girl so they said O.K. and I was put on the line and they were teaching me what to tag and what not to tag and Velma Rubbio was a committeewoman and cussed me every time I put a tag on. They would tell me some holes I would have had to have a magnifying glass to see. The girls were telling me to put a tag on it and I was doing what they told me to do and I didn't know what to do and I said, "If I put a tag on that Velma gets mad." They said, "Don't pay no attention. That is just the way she gets."

Then if I miss anything she hollers at me.

Q. (By Mr. Grodsky): Who is she?

A. Velma.

Q. What's her job? A. Repair girl.

Q. When was this, was this when you first went to work for the company?

A. Yes, it was.

Q. In April? [376]

A. It was in April.

(Testimony of Loraine Evans.)

Q. 1953? A. Yes.

Q. All right.

A. I was on small parts on the table. I didn't know anything and every time I put something on the hook the girls would call the boss on me and tell me I wasn't supposed to put it there and I would ask the boss where to put it and she'd said the hook. I said that is where I was putting it and they said no. [377]

* * *

Direct Examination

(Continued)

By Mr. Grodsky: [384]

* * *

The Witness: She asked Alex for a transfer that she did not want to work beside of me and went way down to the other end.

Q. (By Mr. Grodsky): I didn't ask you that. I asked you how were you and she working together.

A. Yes, we were working side by side.

Q. Was your working relationship harmonious?

A. Yes.

Q. Was it friendly? A. Yes. .

Q. Did she tell you that she had asked Alex for a transfer? A. No, I heard them.

Q. You heard what?

A. I heard her when she asked Alex. [388]

* * *

(Testimony of Loraine Evans.)

Q. (By Mr. Grodsky): During the course of time that the union activity was going on, was it your observation from your work as an inspector that more or less harnesses were being produced in the factory? A. Yes.

Q. Which was it?

A. There were more. [390]

* * *

Q. In a conversation which you related to us which you had with Mr. Simon and in which you told us you mentioned to him about certain petitions being passed around by IAM adherents and Mr. Walton stuck his head in the door at that point, do you remember you told us about that conversation? A. Yes, I do.

Q. Did Mr. Simon say anything as to whether or not he knew who was passing these petitions around?

A. He told me he did not know who was passing the petitions around and I told him I do, I know that Dorothea Randall was passing these petitions around and he told me, "I can't prove it."

Q. When he said, "I can't prove it," is he talking about himself saying he couldn't prove it or, in effect, challenging you that you couldn't prove it? A. He said, "I can't prove it."

Q. Did Mr. Simon say, "I can't prove it," or did he mean you, Mrs. Evans, can't prove it?

A. When I told Mr. Simon I knew who was passing those petitions around and it was Dorothea Randall, he says, "I can't prove it." [392]

(Testimony of Loraine Evans.)

Trial Examiner: Let the record show that the witness in giving that response pointed her finger at herself. I take it from the witness' response that she was at that point putting herself in the place of Mr. Simon and, in effect, intending to testify that Mr. Simon said, "I, Mr. Simon, cannot prove it."

Mr. Grodsky: We all understand that [393] response.

* * *

Q. (By Trial Examiner): With reference to this circulation of petitions by Dorothea Randall, how did you happen to know of them?

A. I saw her carrying the petitions from machine to machine for different girls to sign and this girl signed one right straight in front of me about the distance from me to you.

Trial Examiner: Let the record show the witness indicates a distance of about three feet.

Q. (By Trial Examiner): You observed this while you were at work? A. Yes, sir.

Q. At your station?

A. Yes, sir, I saw this one girl, she signed two petitions right in front of me and I asked her what it was about and she told me she was told to tell it was a T.V. program.

Q. At the time that you observed that activity on the part of Dorothea Randall, can you tell us who, if anyone else, saw Dorothea Randall circulating the petition?

(Testimony of Loraine Evans.)

A. Ann saw it, for one, and there were several other girls.

Q. I mean, just a minute. I want it clear, I'm asking you to testify not what other people may have told you they saw but at the time that you saw her who saw the same incident?

Mr. Macomber: I don't like to object, but isn't that calling for a conclusion of this witness?

Trial Examiner: I'm asking for persons within her area [395] of vision.

Mr. Macomber: People who were there?

The Witness: The repair girl was there.

Q. (By Trial Examiner): Were there any supervisors within viewing distance?

A. No, I didn't see any. [396]

* * *

MITCHELL J. SIMON

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Macomber:

Q. You are the Mr. Simon previously sworn and testified in this matter and I think you said you were the production manager of the local west coast operations, is that correct?

A. That is correct. [399]

* * *

(Testimony of Mitchell J. Simon.)

Mr. Macomber: Before proceeding to the next subject, I just wish to call to the Examiner's attention Article 5 of the agreement in force during the year 1954 between the Essex Wire Corporation and the International Association of Machinists which is one of the exhibits in evidence and with particular attention to Article 5 thereof under the heading of "Complaint and Grievance Procedure" and I read briefly as follows:

"The Company and the Union agree to abide by the following provisions in the matter of complaints and grievances.

"The grievance committee as referred to in Step 3 shall be composed of two members selected by Automotive Electric Lodge No. 1930, and two members selected by the Company.

"Grievances regarding layoffs and discharge shall be filed [402] within forty-eight days in order to be valid."

The Witness: The original contract has hours. That is a typographical error.

Mr. Macomber: Very well, may we indicate that correction?

"The above times may be extended by mutual agreement to provide time for investigation." Et cetera, et cetera.

Then, there are steps outlined which I won't bother to read into the record at this time.

Q. (By Mr. Macomber): In that connection I call your attention, I will ask whether or not there

(Testimony of Mitchell J. Simon.)

was some grievance proceeding or hearing had in connection with the discharge of Loraine Evans?

A. There was.

Q. Were you one of the members of the committee representing the company in accordance with the union contract? A. I was.

Q. Who was the other company representative?

A. Fred Harms.

Q. Can you tell us who the members of the union were there represented in accordance with the contract?

A. The two members selected by the union was the regular grievance committee who, I believe, is composed of Helen McLewin and I don't recall the other girl's name. I think Inez.

Q. Is that enclosed in your record? [403]

A. Yes.

Q. Do you in connection with this grievance procedure keep a record, regular records of the procedure?

A. We keep a record of all the proceedings, all the notes that were taken, everything that was said and keep a record in our file and the union representatives keep a record in their file for disposition of any such grievance.

Q. In that connection, I will exhibit to you Respondent's next number for identification and I will ask you whether these are the records which are kept in the regular course of business in connection with grievance procedure hearings and these records consist of, as I now exhibit them to you, a

(Testimony of Mitchell J. Simon.)

white sheet of paper entitled "Report of Grievance Committee," a document so entitled.

And then there are blue forms called, "Grievance Form" Lodge 1930 and white papers attached. Another grievance form called, "Lodge 1930."

Are these the records kept in connection with the grievance procedure involving Loraine Evans?

A. These records are the complete record of the case involving Loraine Evans and one other employee by the name of Loretta Brown who was involved in this case and disposed at the same time.

Q. Loretta Brown was a member of what union during this time? [404]

A. Same union, IAM.

Q. She was a member of the IAM?

A. Yes.

Q. Following this difficulty involving Loraine Evans immediately prior to her discharge or at about the time of discharge, did she invoke the grievance procedure of your contract?

A. She did as shown here in the evidence.

Q. I see. Will you tell us briefly now something of the procedure which resulted in her discharge, the hearing was held, and that sort of thing?

A. Well, the procedure——

Q. I don't want the legal procedure. I just want you to tell me what you did, who was there, what kind of evidence you took and that sort of thing.

A. They followed the steps of the regular grievance procedure until it got to the third step as

(Testimony of Mitchell J. Simon.)

outlined in our contract. We on this case had the committeewoman who represented the two girls.

Q. Who is she?

A. Betty Cave. She's committeewoman for that side of the harness department. She sat in as representative of the aggrieved. While the aggrieved gave their testimony, both Loraine Evans and Loretta Brown, that is, their committeewoman sat in with the four designated, two members of the company, [405] two members of the union that formed this board to see, to speak in Step No. 3. We heard the aggrieved.

Q. Just in the most general way, what did the aggrieved say about each other? I don't want you to go into the details of the conversation, what was the dispute or clash of arms about?

A. The dispute as outlined in this grievance procedure, Mrs. Evans——

Q. You say grievance procedure. You are referring to Respondent's next for identification?

A. That's right. And outlined in there. We tried to get the exact, as close as we could, the words spoken by both parties at the board hearing.

Briefly and generally Mrs. Evans declared a saintly attitude that she had nothing to do with the bickering that went on that morning for which she had been previously warned in a written record put in her personnel file. Mrs. Evans had continually had trouble with people.

Trial Examiner: Just a moment. You were

(Testimony of Mitchell J. Simon.)

asked to describe what was said. Don't give your conclusions.

The Witness: This was also said.

Trial Examiner: By Mrs. Evans? You were describing what Mrs. Evans said.

The Witness: This is what was said at the hearing.

Q. (By Mr. Macomber): I don't want you to give your conclusions at this time about Mrs. Evans. I only want you to [406] tell me at this time in a general way what Mrs. Evans said about the fracas and about that other lady who was also discharged. Her name was what? A. Brown.

Q. What she said most generally. I don't want you to go into a general conversation. What was the dispute about?

Mr. Grodsky: May I interrupt here? I don't know if this is a proper objection. It occurred to me we ought to get the description of the grievance procedure in this respect. These two grievances were not heard simultaneously and the two girls were not present at the same time, if I am correct, in the hearing room.

Therefore, I believe it would be more appropriate if you talk about each one separately, what did Mrs. Evans say when her grievance was being processed and what did Miss Brown say when her grievance was being processed.

Mr. Macomber: I'm not trying to determine the merits of the controversy by this witness' testimony. I am merely trying to show what came to the atten-

(Testimony of Mitchell J. Simon.)

tion of management that was a grievance procedure in a general way, what management knew about it. That is the sole purpose. I am not trying to decide whether Mrs. Brown was right or Mrs. Evans was right or whether both were right or both wrong at this time and that is the limited purpose for showing it and I want to avoid as much detail as [407] possible.

Unless you feel it is necessary, I don't want to prolong the hearing unduly by what everybody said and that sort of thing.

Mr. Grodsky: Let me assure you, I will if you don't. I'm going to go into it in detail.

Trial Examiner: At the present time on direct examination I think counsel's purpose is proper and I will reserve ruling on that. Mr. Grodsky's point with respect to procedure may or may not be material. If it is correct Mr. Simon can simply state it.

Did Mr. Grodsky correctly state the procedure that Mrs. Evans was present before the board herself and without Loretta Brown being there and then Loretta Brown gave her version independently and not in the presence of Mrs. Evans?

The Witness: That is correct, but at each time their committeewoman representative was present.

Trial Examiner: I understand that from our previous testimony.

Having in mind Mr. Macomber's—the purpose for which he elicited this testimony, would you then proceed in a general way and give the substance of

(Testimony of Mitchell J. Simon.)

Mrs. Evans' statements and the substance of what Mrs. Brown said?

The Witness: Briefly, Mrs. Evans denied she was arguing at all to begin with. Then she denied that she argued after working hours, that she had had this little dispute or [408] misunderstanding. I don't know the words she used before working out. That is briefly, in general. In the presence of her committeewoman and plus the four members of the board.

Mrs. Brown, on the other hand testified that she was in an argument with Mrs. Evans, that the argument started before working hours and carried on until 10:00 o'clock in the morning until the rest period at which time Mrs. Evans proceeded to go to the foreman to tell him that if he heard about an argument that it was untrue. That was the crux of Mrs. Brown's story generally and briefly.

Q. (By Mr. Macomber): Acting on whatever evidence you had before you, did you follow the recommendations of the grievance committee in regard to both of them?

A. That is correct, which is the company policy whenever two people are involved in a dispute, in order that no partiality be shown, we make no determination about who was at fault. We consider both parties participated. We started at it as inconsequential. We don't try to make that determination because it runs out in great hearings and showing no partiality whatever we discharged both employees.

(Testimony of Mitchell J. Simon.)

In other words, you get two employees who fight. As a matter of policy, you don't know who is right or wrong, you don't care. It hurts business, you let both go. It hurts business, hurts everybody working, hurts harmonious relations in the plant. That is it. [409]

Q. Now, did you let Mrs. Evans go?

A. We did.

Q. Let me finish my question. Did you let her go for any reason other than you expressed?

A. Absolutely not.

Q. Did you have in mind when you discharged her that you were discriminating against her because of any activity she had with the United Mine Workers?

A. Absolutely no thought of discrimination.

Q. You have told us that Miss Brown, or Mrs. Brown, whatever her name was who was let go, at the same time was a member of the other or opposite union?

A. As far as I'm concerned, they were both members of the same union using the IAM union grievance procedure.

I don't recognize only the union the National Labor Relations Board has designated as the bargaining agent for that plant. I can't participate in any factional disputes, people's feeling and so on.

Q. The grievance committee, I think the record shows, was unanimous of the four members on the discharge?

(Testimony of Mitchell J. Simon.)

A. That is correct, by means of secret ballot vote.

Q. But the vote is there? A. Yes.

Q. Three of the four recommended the discharge of Mrs. Brown?

A. Yes, by the same vote. [410]

Mr. Macomber: I offer in evidence at this time for the limited purpose to suggest only the company's awareness of the grievance procedure and not as binding on the merits of the controversy in the grievance. I offer this as Respondent's Exhibit next in order.

Trial Examiner: Any objection?

Mr. Grodsky: No objection to the receipt in evidence. I would like to ask one or two questions on voir dire.

I trust that counsel doesn't think I'm abusing the privilege of voir dire examination. I have been using it quite a lot in this proceeding.

Mr. Macomber: I have no objection to it myself providing it bears upon the question of admissibility of this document. If you are using voir dire to cross-examine at this time, I'm going to object.

Mr. Grodsky: I don't intend—I don't think I have done it yet.

Trial Examiner: Very well, I will reserve ruling. You may have the witness on voir dire.

(Testimony of Mitchell J. Simon.)

Voir Dire Examination

By Mr. Grodsky:

Q. Who prepared that report, the document of four pages, the first document, which is headed "Report of Grievance Committee"?

A. That is my report.

Q. That is your report prepared by the company and after [411] you dictated it to your secretary, I gather?

A. Took it from my notes.

Q. And then after it was prepared in its present form, did you read it over and see that it represents correctly what your notes reflect?

A. Absolutely, to the best of my knowledge and ability.

Q. I notice that there are some underlinings of some words written on Page 2, generally, they are names and are underlined in pencil.

That underlining relates to something that happened later when you reread it for other purposes, is that right?

Mr. Macomber: I think I may have underlined that. It is very possible at the time I first perused it that I did that. I didn't have in mind I'd introduce it. It's very possible.

Mr. Grodsky: The only reason I asked, I want the record clear.

Mr. Macomber: I can say, although I wouldn't be too sure about this, but I'm almost certain I underlined these names.

(Testimony of Mitchell J. Simon.)

Mr. Grodsky: That is all right. The only reason I mentioned that that the underlining is not part of the exhibit.

No further questions.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Let the record show that after discussion and pursuant [412] to a suggestion of General Counsel's representative, the respondent's exhibit next in order may be designated as Respondent's 3 for identification and that the various parts thereof shall appropriately be designated by letter designations A, B, C, D and so forth for each of the several parts thereof, whatever the number may be.

Upon that understanding, Respondent's Exhibit 3 and its several parts will be received in evidence.

(Thereupon the document above referred to was marked Exhibit No. 3-A through 3-E, inclusive, and was received in evidence.)

RESPONDENT'S EXHIBIT No. 3-A

Report of Grievance Committee

On June 4, 1954, one Lorraine Evans and Lauretta Brown were discharged by foreman of the Harness Department for causing contention among employees by constantly bickering and fighting. They subsequently filed a grievance as follows:

(Testimony of Mitchell J. Simon.)

Respondent's Exhibit No. 3-A—(Continued)

Employee stated, "I feel I have been unjustly discharged and wish to be reinstated. Although a warning was given me on May 4, 1954, I feel that it was unjustified. My work is satisfactorily performed and should warrant some consideration. The disagreement on this date, June 4, 1954, was carried on before our regular working shift and was not carried into our working hours. Witnesses in my behalf will be M. Dillon, S. Allman, J. C. Hamilton, Ruth Arlin." Signed by Lorraine Evans, Shop Committeewoman Betty Cave, Foreman Kenneth King.

The foreman's reply on the grievance as follows: "On May 4 this person was warned by me that in the future if there were any other disagreements between her and Laurretta Brown, it would result in a discharge." Also at that time a written statement was made stating that Lorraine Evans, because of previous arguments, was not in good standing with the company and would be discharged at her next offense.

The aggrieved was dissatisfied with these two steps of the grievance and demanded that the Union hear the grievance at the regular Grievance Meeting.

On 6/17/54 a Grievance Meeting was held by the following: Two members of the company, M. J. Simon and F. N. Harms; two members of the Union, H. McLewin, and Inez Hobbs. Both cases were

(Testimony of Mitchell J. Simon.)

Respondent's Exhibit No. 3-A—(Continued)
to be heard. The aggrieved were to be heard and they would be represented by the committeewoman, Betty Cave, during the hearing only.

Before the hearing started, it was decided by the Grievance Committee that those in attendance would hear the grievances separately on the individuals concerned namely Lorraine Evans and Laurretta Brown. Lorraine Evans was heard first. M. J. Simon started the meeting by reading the grievance procedure as outlined in our contract because the aggrieved wanted other people to attend. After the grievance procedure had been explained, the grievance form was read conditions of which were heretofore stated. The aggrieved stated that the occasion as referred to in the grievance was before working hours. She also stated that there really was no argument, that she never has had any arguments with the other party nor has she had trouble with other people, and there were witnesses who could prove this and that her foreman would agree that she was a good worker. Her statements were, of course, untrue which was known because of the numerous times this girl has had trouble with other employees. However, her committeewoman in attendance at this meeting did report that she had been approached by the foreman on May 4, 1954, and told that a report was being put in the personal file of Lorraine Evans stating that we did no longer condone the agitation and contention caused by this girl's inability to get along with other people. Mr.

(Testimony of Mitchell J. Simon.)

Respondent's Exhibit No. 3-A—(Continued)

Simon then explained and told of his own experiences in which he has had to settle problems concerning this girl on previous occasions for bickering and fighting in the area and also explained how it was necessary for him to accompany Mr. Harms into this area on previous occasions to iron out difficulties caused by this person. The aggrieved then related instances where she was unjustly accused by other employees of causing contention and that she cooperated by helping out the same individual who was doing repair work on the line, and also that the numerous repairs, etc., were never caused during the shift on which she worked. Then Mrs. McLewin, one member of the Grievance Committee, asked the aggrieved if she felt that her statement of not having trouble in the past with other people was absolutely correct because it was brought to her attention many times by other individuals whom she had trouble with. Mrs. McLewin then asked, "Did you ever have trouble with Ellen Graesch, Dorothea Randall, Shirley Myrick, Vina Holst, Rita Frey, Golda Riggins, Laurretta Brown, or Jean Rooney?" The answer to all of these by the aggrieved was "No." These, of course, are some of the people with which the aggrieved had caused trouble and which made it necessary for Mr. Harms and Mr. Simon to settle the problem. The aggrieved then stated that she always did her work and why the people disliked her, she did not know. She also reassured the committee that there was no argu-

(Testimony of Mitchell J. Simon.)

Respondent's Exhibit No. 3-A—(Continued)
ment on the date she was discharged and that she did not tell the foreman that they were arguing.

Lauretta Brown, the other aggrieved party, was then heard. She stated that she had had an argument with Lorraine Evans concerning some of the boots being off the terminals on May 4, 1954. At that time she told her that her foreman had advised her that when she found an excessive number of these coming through, she was to report it to the foreman immediately and that Lorraine Evans told her on this date that she didn't have to do it nor help her out and to just let it pile up and pay no attention to it. Lauretta Brown then related to the committee the argument which took place on the date of 6/4/54, the day of the discharge. That Lorraine Evans accused Lauretta Brown of telling one J. C. Hamilton distorted stories of what she, Lorraine Evans had related to Lauretta Brown. Then the argument began. Then Lauretta Brown informed Lorraine Evans that since they had been warned for fighting on previous occasions, that if the argument continued, they would surely be discharged on this day. Betty Cave, the committee-woman representing the aggrieved related that Lauretta Brown was instructed previously that if there were anything wrong with the wires to notify the foreman and that she had been told that she was doing it in order that the problem could be corrected at its source. Mrs. McLewin then asked this

(Testimony of Mitchell J. Simon.)

Respondent's Exhibit No. 3-A—(Continued)

aggrieved party, "Did you know that Lorraine Evans was going to discuss the matter with Mr. King, the department foreman?" Her answer was no. Mrs. McLewin then asked, "How do you feel you were unjustly discharged?" Laurretta Brown stated that the argument was unavoidable on her part and that Lorraine Evans continued this argument because she did not care what happened to her job because she was constantly talking about getting another job and it didn't make any difference to her, but in the case of Laurretta Brown, she needed her job as she is the sole support of two children. Mr. Simon then stated that whatever the circumstances may be, it is the policy of the company that any two people engaged in arguments and fights in the plant were both subject to discharge and it is an unfortunate circumstance that this person was participating in these arguments both times. We then called in one of the witnesses named and only one because of the fact that the other witnesses named on the grievance by Miss Evans were her brother and close friends who were not in the immediate area. Witness M. Dillon stated before the committee that she had not known of an argument that particular morning. However, they had argued the day before and that on the date of 6/4/54 she relieved Lorraine Evans on the overhead conveyor at approximately near break time for 10 minutes. Witness was not asked any questions and dismissed. Mr. King, the department foreman, was called in

(Testimony of Mitchell J. Simon.)

Respondent's Exhibit No. 3-A—(Continued)

and asked by the committee how he knew of the argument. He related that he had heard of the fuss going on and sent to the section foreman, Mr. Kresin, in charge of the area and was discussing it with him when he was approached by Lorraine Evans who had been relieved at that particular time. He sat down with Miss Evans in his office and unlike her previous statement, she stated that there had been an argument going on and she wanted to report to him that Miss Brown was causing the trouble for her and she knew that from her previous problem that she would be discharged if the arguments did not stop. Mr. King then stated that it is just another series of the same thing and he could not accept her story as gospel because of her previous troubles and that he would listen to Laretta Brown's side of the story before making his decision. Since Miss Evans accused Laretta Brown of starting the argument by telling stories about her and calling her names which were derogatory to her character. Mr. King then heard Laretta Brown who stated that she had said nothing about Miss Evans to J. C. Hamilton and that Miss Evans had been talking about her and arguing approximately five times with other people in the same area and always making trouble. She also related that she had only been warned once before and since it concerned the same girl that she didn't feel she should be discharged. Mr. King stated then that he discharged these people for arguing. Mr. King

(Testimony of Mitchell J. Simon.)

Respondent's Exhibit No. 3-A—(Continued)

then left the committee hearing and Mr. Kresin, the section foreman, was called in. He was asked by the committee what he knew about the argument and how he knew it was going on. He stated that the people involved did not work together and Miss Brown went to him telling him that Lorraine Evans was causing trouble with her again and arguing, and other girls in the area related that the same argument was going on again and they did not like to work in that kind of atmosphere. Miss Brown then requested Mr. Kresin to move her off that particular job so she could get away from the area entirely. She felt that there could be no one in that area working with any peace of mind because of Miss Evans. Mr. Kresin then stated he could not move her at that particular time because she was needed on that job and that he then turned the case over to Mr. King, general foreman of the department.

After this testimony was heard, the facts of the case were discussed by the committee, the grievance procedure in the contract discussed, the company policy regarding fighting was discussed, and then the two members of the company and the two members of the Union according to the contract proceeded to vote on a secret ballot regarding the question as follows: Do you feel that the aggrieved, Lorraine Evans, was discharged unjustly? The ballots were taken and counted and are on file. Four nays. A ballot was then taken regarding Lau-

(Testimony of Mitchell J. Simon.)

Respondent's Exhibit No. 3-A—(Continued)
retta Brown on the same question. Results were three nays and one aye. The case was closed and the two people involved remained discharged.

Received in evidence August 4, 1954.

Mr. Macomber: If you have any questions, you may cross-examine.

Mr. Grodsky: Yes, I have some questions.

Cross-Examination

By Mr. Grodsky:

Q. Mr. Simon, how was the vote taken of the committee, was the vote taken immediately after Mrs. Evans was heard or did they wait until they heard Mrs. Brown's case as well and then they took the vote on each one of the grievances?

Mr. Macomber: I raise this question, I may be wrong, but I raise this question: I have stated that this was introduced for the limited purpose only of not attempting to prove or disprove anything with relation to the merits of the controversy between these parties and it was introduced for the limited purpose of showing that the grievance [413] procedure required under the union contract was filed and as it might bear upon the good faith of the company as reflected through the activity of this particular official who is now here testifying. I apprehend that any evidence by way of cross-examination or otherwise that bore upon that good

(Testimony of Mitchell J. Simon.)

Respondent's Exhibit No. 3-A—(Continued)
faith would be proper. I apprehend that any evidence to show whether or not the hearing that these people had was actually a fair hearing, whether they got due process as of law as we lawyers like to think of the due process of law.

Whether there was actually any merit to the evidence from which the grievance committee made its report would not be particularly material at this point in view of the limited purpose for which we make this offer. We can get into the matter of the actual controversy of the parties and undoubtedly will with other evidence.

Trial Examiner: My own reaction would be that as bearing upon the company's good faith, if you want to call it that, the company contending that they acted in good faith and the General Counsel contending that it acted with discriminatory motive, it would seem to me that the pending question has a bearing on precisely that point.

It may very well be that your observation with respect to cross-examination as to the merits of the controversy might be well taken but on the particular pending question as to the mechanics of the vote, I can see that to be just as germane [414] in giving a picture of the proceeding per se as the other material embodied in Respondent's Exhibit 3.

Mr. Macomber: That is why I did not object to the last question, if you recollect. I had this in mind, if the company followed the grievance procedure required by the contract which they have

(Testimony of Mitchell J. Simon.)

Respondent's Exhibit No. 3-A—(Continued)
with the union, keeping in mind that this grievance procedure was, after all, the subject of a bilateral contract with the union, that two members of the union also participated in these determinations, these proceedings and presumably, in the establishment of this procedure, that even if one were to criticize the procedure as such, it would, you have got to keep these other factors in mind. The company could not make any unilateral determination as to what due process was or wasn't.

With that observation I will retire but I make that statement because on that you may form the basis for my objections I may hereinafter make.

Trial Examiner: Very well, I will have the point in mind.

The pending question, Mr. Simon, is whether you recall the manner in which the vote was taken in respect as to Mrs. Evans and Mrs. Brown, respectively.

The Witness: Since the case involved two people we heard all the facts by both people and then proceeded to take our vote.

Q. (By Mr. Grodsky): In reply to a question by your counsel, [415] I don't know whether you intended the reply to mean that it would seem the discharge was effective only after the time that the grievance procedure had been completed. Isn't it a fact that Loraine and Loretta had been both discharged on the 4th of June and that they thereafter did not work in the factory, that the griev-

(Testimony of Mitchell J. Simon.)

Respondent's Exhibit No. 3-A—(Continued)
ance procedure took place at a considerably later date?

A. Yes, sir, that is in accordance with our agreement.

Q. In other words, at the time of the grievance procedure, they were already in the status of discharged employees? A. Absolutely.

Q. And they weren't discharged as a result of the grievance procedure. In other words, the grievance procedure merely confirmed the company's earlier action?

A. Was right and proper.

Trial Examiner: Is that a correct summary of the purpose of the grievance procedure as you understand it?

The Witness: Absolutely. The grievance procedure is the employee's recourse. [416]

* * *

Redirect Examination

By Mr. Macomber:

Q. You came to the San Diego plant when?

A. September 13, 1948.

Q. Was there already in force an agreement with the IAM union?

A. Yes, there was a National Labor Relations Board vote prior to when I came there and a contract in force with the IAM.

Q. Did you have anything to do with bringing the IAM into that plant? A. No, sir.

Mr. Macomber: That is all.

Trial Examiner: You may be excused.

(Witness excused.) [441]

* * *

PEGGY REDDEN

a witness called by and on behalf of the Respondent,
being first duly sworn, was examined and testified
as follows:

Direct Examination

By Mr. Macomber:

* * *

Q. When did you go to work for Essex Wire Corporation?

A. September 13 of 1949. [445]

Q. How long have you been, are you now a committeewoman? A. No.

Q. Leadwoman? A. Yes.

Q. How long have you been a leadwoman?

A. Oh, about a year and a half, two years.

Q. In any particular department or departments during that period of time? A. 103.

Q. 103 generally encompasses what operations there in the factory?

A. The harness department.

* * *

Q. Now, as a leadwoman, from whom do you derive your authority and, by that, I mean from whom do you take your [446] orders or instructions? A. Mel Kresin.

(Testimony of Peggy Redden.)

Q. Your foreman? A. Yes.

Q. During all the time that you have been a leadwoman, has Mr. Kresin been your foreman?

A. Yes, sir, except when they put him over on the other side. Robert Ebker was there for a while.

Q. He is the gentleman to whom you are responsible? A. Yes.

Q. Does Mr. Simon or anyone else in connection with the plant come in and give you any instructions or is that all done through your foreman?

A. Well, I don't know for sure.

Q. He is the only one that comes to you directly and contacts you? A. Yes.

Q. Is that right? A. Yes.

Q. Now, in connection with those instructions, such instructions as you may have received through your foreman whether it was Mr. Kresin or this other gentleman who temporarily took his place, were you given authority to move girls about from job to job?

A. Yes, if it was seen fit to. [447]

Q. If you were seen fit to——

A. We got our orders from the foreman.

Q. With respect to moving girls under those orders? A. Yes.

Trial Examiner: Do you understand the question?

The Witness: Yes.

Q. (By Mr. Macomber): Would it be——

Trial Examiner: Just a moment. There is a

(Testimony of Peggy Redden.)

question with respect to moving the girls. What were the orders that you received?

The Witness: If a girl was needed in another job and if I had one available, why, the other leadlady would ask me if I had one and if I said yes, she'd tell Mel we had to have a girl on the other job.

Q. (By Mr. Macomber): Would it be first necessary before you moved the employee to go to Mel and clear with him?

A. Oh, yes, always went to him first.

Q. You always cleared with him first?

A. Yes.

Q. See if I understand, if there is an opening or a vacancy, you would go to your foreman?

A. Yes.

Q. Who was Mel Kresin, and explain to him about the vacancy and he would furnish instructions to do something about moving the girls, is that right? [448]

A. Yes.

Q. Were you authorized to do it on your own without consulting him?

A. No.

Q. That is what we want to find out. In a general way, what were your functions as a leadlady, what were your duties as laid down to you by Mr. Kresin or any of your foremen?

A. To see that all the girls had work at all times and if there was anything that was needed, why, Mr. Kresin would let us know and what he told us to do, we done.

Q. I see. You are familiar with the operation of the taper machine?

A. Yes.

(Testimony of Peggy Redden.)

Q. The rotary machine?

A. One and two, both of them.

Q. Did you ever work on the rotary machine yourself? A. Yes, I did.

Q. Are you familiar with what is known as the take-off operation? A. Yes.

Q. The so-called wire operation? A. Yes.

Q. And the taper operation? A. Yes, sir.

Q. Would you describe the take-off operation as being [449] particularly difficult or onerous?

Trial Examiner: Specify which rotary conveyor.

Q. (By Mr. Macomber): Of the No. 1, the No. 1 rotary take-off operation, particularly, is that a difficult operation? A. No, it isn't difficult.

Q. How does it compare with the other operations on the same machine as to difficulty of operation?

A. I don't understand you there.

Q. Is it harder on the take-off position, harder than the taper position or the wiring position?

A. No, I wouldn't say so. You could make it either way. That would be up to the girl herself.

Q. Well, now, I'm calling your attention particularly to the 10th day of February, 1954, which is this year and I will ask on that day whether a woman by the name of Frances Miranda came to work. A. No.

Q. Frances Miranda—if I may lead through preliminary matter—had been working on a so-called repair operation, hadn't she? A. Yes.

Q. How long had she been on repair?

(Testimony of Peggy Redden.)

A. Oh, I don't know for sure.

Q. Roughly? A. Couple months. [450]

Q. If you are familiar with that operation, can you tell us, or the Examiner, generally, what the repair operation, so-called, consists of?

A. Well, a harness comes off the big conveyor, it comes down to the checkers and they check it and if there is a terminal missing or a sleeve or switch, they put a white tag on it and the repair girl takes it and she repairs it and then she pushes it on through and it goes to the packer.

Q. Is it a job which requires experience or can just anybody do it?

A. I wouldn't say anybody could do it. You have to know the harness and the wires.

Q. Some experience is necessary? A. Yes.

Q. Do you know whether or not Ann Hamilton had worked at the repair station?

A. Not by herself, she didn't.

Q. Tell me what you know of her connection with the repair station.

A. Let's see, as far as I can remember, she was down there helping out repairing.

Q. Do you know how extensive her experience as a helper was? A. She was all right.

Q. I didn't ask whether she did a good job or bad job as a helper. I just want to know whether you know, and if you don't, [451] you can say so, whether you know how long she worked as a helper down there.

(Testimony of Peggy Redden.)

A. Oh, it wasn't over a couple days, one or two days.

Trial Examiner: In a single stretch or at intervals?

The Witness: No, she wasn't there steady. For the taping machine, the job that she was on, if she was out of wire, sometimes we put a girl up there on the repair table to help out.

Trial Examiner: Normally, how many persons work on repair?

The Witness: One.

Trial Examiner: So that the helper would be a departure from the normal procedure in the sense that she would be an extra person above and beyond the usual requirement for the repair station?

The Witness: Not all the time two girls down there.

Q. (By Mr. Macomber): What does the helper do that the regular girl doesn't do or vice versa?

A. Sometimes the different harnesses, more terminals are coming and one girl can't keep up and so we put another girl down there to help her so it won't stack up.

Q. In any event, on February 10, the day that is the center of inquiry, you had in mind such experience as Ann Hamilton may have had, may not have had at the repair station, is that right, or don't you understand my question? [452]

A. No.

Q. Were you aware on February 10th of such experience as Ann may have had at the repair table?

(Testimony of Peggy Redden.)

A. She couldn't have gone down there and taken completely over.

Q. That is it. Now, tell us about that, you are telling me now that in your mind at that time she couldn't have gone down and taken over that job?

Tell us why you believed that on February 10.

A. Because at that time she didn't know the complete harness in order to take the complete job of repairing over. To my knowledge, you have to know the wires and the complete harness.

Q. In your opinion, she just didn't know it?

A. No.

Q. In what respect had her experience been limited, in your opinion, so she didn't know the full harness? A. On the tape machine.

Q. Now, on February 10, did you have occasion some time to transfer Ann over to Conveyor No. 1?

A. Yes.

Q. Will you relate to the Examiner and to this court of inquiry what the circumstances were that led to that transfer and, when I say the transfer, just tell me what happened to you in the chain of events?

Who—let's put it this way, the first thing, I take it, [453] that this Frances who worked on the repair machine did not show up, is that right?

A. Yes.

Q. And you were the one who first determined her absence or did somebody come and advise you of her absence?

(Testimony of Peggy Redden.)

A. I just don't remember right there but I knew she wasn't there.

Q. All right. And this was about 8:00 o'clock or so at the regular starting time that you learned that she was not there? A. Yes.

Q. Learning that she was not there, I suppose you concluded you would have to put somebody in her place, is that right? A. Yes.

Q. Now, did you then go and see her foreman about who you were to put there in her place?

A. I went and told my foreman we didn't have no repair girl.

Q. You told Mr. Kresin? A. Yes, sir.

Q. What did he say, if anything, to that?

A. He said we would have to find one and put one there.

Q. All right. Did he say anything further at that time?

A. Not at that moment, right then. We waited until the second bell rang which is the 8:00 o'clock and all started to work.

Q. Then what happened? [454]

A. There was another girl. I don't remember right then but we did have two on the big conveyor No. 1, conveyor that was experienced on the repair table.

Q. Who were these two girls that were experienced? A. Inez Hobbs and Jo Hutchins.

Q. So, being aware of their experience, what, if anything, did you do?

A. Mr. Kresin said get Inez Hobbs down there.

(Testimony of Peggy Redden.)

Q. Kresin told you to get Inez Hobbs?

A. Yes; take her off the big conveyor and put her on the repair where she was experienced.

Q. Now, of your own knowledge, what experience had Inez Hobbs had previous to February 10 at the repair station?

A. She had been working on the conveyor, knew the harness and had been on the repair table before.

Q. Do you know how extensive her experience had been on repair? A. No, I don't.

Q. You just knew she had had experience?

A. Yes.

Q. Go on and tell me what happened then.

Trial Examiner: Before going further, you testified your first conversation with Mr. Kresin was at or about the time of the 8:00 o'clock bell. When were you advised by Mr. Kresin that Mrs. Hobbs would be assigned to the repair table? [455]

The Witness: Oh, I don't know for sure.

Trial Examiner: Approximately?

The Witness: I don't know. Approximately, it was after 8:00.

Trial Examiner: You can't say how much after?

The Witness: No, I can't; I can't remember.

Trial Examiner: Very well.

Q. (By Mr. Macomber): After the foreman told you to assign Inez to the repair station, was there any discussion between you and the foreman as to who would take Inez' place on the conveyor No. 1?

A. He had asked me who I had at the time who

(Testimony of Peggy Redden.)

could work on the big conveyor and Ann Hamilton was the only one. She had been over there before.

Q. He asked you then who you had available?

A. Yes.

Q. And you told him that Ann was the one that was available? A. Yes.

Trial Examiner: When was this question asked at the time when you first told him of the vacancy on repair or at the time when he suggested the assignment go to Mrs. Hobbs?

The Witness: Well, after we knew that they was going to put Inez down on the repair table.

Trial Examiner: I see. Go ahead.

Q. (By Mr. Macomber): Did you have any further conversation [456] with Mr.—I will call him your foreman so I don't confuse you—did you have any further conversation with your foreman about this?

A. He said put Ann on the big conveyor. I went down and told Ann to come with me and she did. I took her down to the big conveyor and I went over to Betty Cave because I didn't see Helen Greenwood at the time and she said that Helen was down relieving and I went down and told Helen that they were putting Ann on the take-off, that Debbie was to go down to the repair table. And as I did that, Helen motioned and the girls had already knew ahead of time that——

Q. When you put Ann on the take-off position, was there any further conversation between you and Ann relative to her going over there?

(Testimony of Peggy Redden.)

A. No.

Q. And at about what time, if you recollect, did you send her over there?

A. Close to 9:00 o'clock.

Q. Did you have any further conversation with Ann up until the break at about 10:00 o'clock?

A. No.

Q. Were you in the immediate vicinity of the rotary No. 1 during this intervening one-hour break?

A. No, I had my little conveyor, the No. 2 conveyor, and the tapers to watch. [457]

Q. You were not watching the No. 1 conveyor during that period of time? A. No.

Q. Was there any request from Ann for gloves or anything of that kind when you put her on that take-off position of the No. 1 conveyor?

A. I don't know.

Q. Was there any request of you, I'm only asking you of your own knowledge? A. No.

Q. There was no request and had she or had she not, according to your own observation, worked on take-off position No. 1 on the No. 1 conveyor?

A. No; she had never worked on the take-off position on No. 1.

Q. Never worked on the take-off station but had worked on other stations on the same conveyor No. 1? A. Yes.

Q. In a general way, how extensive had been her experience on Conveyor No. 1, how long had she worked on it? A. Oh, two or three weeks.

(Testimony of Peggy Redden.)

Q. Now, did you work, did you have occasion to come back to the rotary conveyor No. 1 during that one hour or were you busily engaged on other activity that you just described?

A. I was busy. [458]

* * *

Q. Do you know a Eunice Ford? A. Yes.

Q. Was Eunice Ford on duty, if you recall, the morning of February 10? A. I think so.

Q. It was likely that she was there, anyway?

A. Yes.

Q. Did you have a conversation with her some time between 8:00 and 9:00 o'clock in the morning, if you recollect?

A. No, just telling her what we were running that morning.

Q. Did she say something like this to you in any conversation that you presently recollect, that is, between 8:00 and 9:00 o'clock in the morning, did this Eunice Ford say to you, "Let's put Ann on the conveyor. She is sitting on her dead butt"?

And did you then say, in effect, "I will go and see about it"? A. No. [459]

Q. Did you recall any such statement with her?

A. No.

Q. Did you thereafter following any such conversation go in and see Mr. Simon?

A. I didn't even know Mr. Simon was in the plant that morning.

Q. Did you come back to this Eunice Ford and

(Testimony of Peggy Redden.)

say to her, "Simon said, 'I don't give a damn what you do' " ? A. No.

Q. Did you have occasion at any time before this circumstance of the 10th of February, have occasion to go in and discuss with Mr. Simon whether or not you were going to put this woman, Ann Hamilton, on that job?

A. I never went into Mr. Simon's office and discussed the work of the factory with him.

Q. And that includes Ann Hamilton on the 10th day of February, or anytime prior thereto?

A. Yes.

Q. Is that right? A. Yes.

Q. Now, were you present in the court yesterday when Mrs. Evans testified? A. No.

Q. You recall an operation there where there are tags placed on the wires for approval or nonapproval of the operation?

A. Yes, little white tags, the checkers have. [460]

Q. Do you recall any occasion when you tore those things off in the presence of Mrs. Evans?

A. No.

Q. (By Trial Examiner): There was testimony yesterday about red tags. Are red tags used for any purpose?

A. The inspectors, Alex, Mr. Gordon, and another man there, I don't recall his name, they are the ones that put on the red tags for rejected work and the only ones that can take them off.

Q. Well, now, is there—is a difference between the significance of red tags and white tags?

(Testimony of Peggy Redden.)

A. To me, there is.

Q. What is the distinction?

A. White tags, the checkers put them on and the repair girl takes them off and the harness goes on down the line to the packer and if there's a red tag on it, then either Mr. Kresin or Mr. Gordon check the work and then we have to get the inspector for that.

Q. I see. Do those go in the normal course of events to the repair table or looked at first by Mr. Gordon or Mr. Kresin?

A. No, sir; generally looked at first.

Q. I see. And what would be the, oh, I gather from what you tell me that the checkers would put on a white tag in the event of a missing terminal or some other difficulty that the repair girl normally would be expected to correct? [461] A. Yes.

Q. What occasion calls for the addition of a red tag, what would be, what would have to be wrong, if anything, before a red tag would have to go on as distinguished from a white tag?

A. Well, if there's a—a lot of harnesses coming down or on other small jobs coming down and there's a terminal missing on quite a few of them, she most generally holds them up to find out why so many are missing.

Q. Well, would I understand you correctly that a red tag would indicate a more serious repair problem that would require the attention of the supervisory personnel personally? A. Yes.

Trial Examiner: Very well. Go ahead.

(Testimony of Peggy Redden.)

Q. (By Mr. Macomber): Would there have to be a major defect for the red tag normally to be added?

A. No. As I said before, if there was a lot of terminals, which is most generally the cause.

Q. But, in any event, did I understand you to say it isn't your function to make such inspection?

A. No.

Q. Or pass approval or disapproval?

A. No; I'm not checker or inspector.

Q. Do you recall some time prior to February 10, 1954, when the question of controversy between the United Mine Workers and the IAM when the campaign started to set in? [462]

A. Yes, there was campaigning around there.

Q. When did that commence?

A. After the holidays.

Q. It would be after the Christmas holidays?

A. Yes, sir; New Year's.

Q. What form did such campaigning manifest itself?

A. Well, there was a lot of talk and Mrs. Evans at one time had asked me, she had called me up there about something. I don't remember right now what it was and in the same conversation, she had asked me what I thought about the United Mine Workers and I told her I didn't like it, that I was satisfied with the union that we had in. I couldn't see any sense of anything else coming in the plant.

Q. That was the conversation you had with Mrs. Evans?

A. Yes.

(Testimony of Peggy Redden.)

Q. Did you have any further conversation with Mrs. Evans?

A. Off and on about work and family life.

Q. And in what other forms did this campaign manifest itself? I'm not asking you with relation, particularly, to the activity of either Mrs. Hamilton or Mrs. Evans, just generally through the plant, were there buttons, was there conversation, was this buzzing union activity and so forth going on? Give us some general idea.

A. There was buttons popping upon different ones and talk going around the plant and little white tags coming down on [463] the overhead conveyor. Anything to keep the girls in an uproar.

Q. When did that start?

A. January and February.

Mr. Grodsky: Just a second. May I have the last complete question and answer read?

Trial Examiner: Let the record be read.

(The record was read.)

Q. (By Mr. Macomber): I show you No. 5, General Counsel's No. 5, is that the kind of doo-hickey that you see coming down from time to time on those conveyor belts? A. Yes, some.

Q. How frequent were those things or objects similar to that observed by you to come down on conveyor belts?

A. Well, I don't know how many came down but it was enough that the girls on the taping ma-

(Testimony of Peggy Redden.)

chine and graters at the time saw them and their attention was called.

Q. Did you ever put any on? A. No, sir.

Q. Did you ever see anyone put one on and send it down? A. No; I didn't see anybody.

Q. Did you see anybody put them on?

A. No.

Q. Here are a couple little doohickies that you handed me, a couple little cards upon which there is some miscellaneous [464] writing.

Where did you obtain those?

A. Off the overhead conveyor.

Q. Which overhead conveyor?

A. The one that carried the harnesses to the oven, around to the checkers and repair girl and packers.

Q. Is that the conveyor that passes by Mrs. Evans' station? A. Yes.

Q. When did you obtain those cards, approximately?

A. Well, it was right after we knew that the Mine Workers were really trying to get into the plant.

Q. All right. This is illustrative of the sort of thing that would come down, is that right?

A. Yes.

Q. Do you know whose handwriting appears on these? A. No, I can't see.

Q. Do you know who put these documents on the conveyor? A. No.

Mr. Macomber: For the sake of the limited pur-

(Testimony of Peggy Redden.)

pose of the kind of stuff that came down the conveyor, I will offer this as Respondent's next numbered exhibit. I offer them collectively.

Trial Examiner: Very well. They may be designated as Respondent's 4-A and 4-B.

(Thereupon, the documents above referred to were marked Respondent's Exhibits No. 4-A and 4-B for identification.) [465]

Q. (By Mr. Macomber): My sight is not so good, particularly without glasses. I wonder if you would read this?

A. "I'd rather be a Mine Worker and make money than an IAM and give money."

Q. That appeared on the back of that card. Is there anything on the other side of that of significance? A. "Why don't you quit."

Q. All right. Now, read what is on the back of that.

A. "You might track along with us. Ha! Ha!"

Q. That was the sort of thing, in a general way, together with the Government's exhibit last mentioned, that from time to time would find itself on those conveyors, is that right? A. Yes.

Q. Now, I will show you a bulletin, dated the 14th of January, 1954, addressed to all employees, and ask you whether you have had occasion to see that bulletin on the plant premises, on the bulletin board or elsewhere on or about the plant?

A. I don't remember of especially seeing this one.

(Testimony of Peggy Redden.)

Q. If you don't remember seeing that one, do you remember seeing any bulletin down there at the plant that pertained to the question of campaigning on company time or company premises?

A. No, I have heard that there was supposed to be no campaigning whatsoever.

Q. You had heard that by word of lip from other employees? [466] A. Yes.

Q. Had you heard that from your foreman or what source?

A. Through the girls at the plant.

Q. Now, there's another document entitled, "Rules and Regulations," Respondent's No. 1. Did you at any time prior to this day see any rules or regulations posted there on company premises?

A. I don't remember.

Q. You don't remember whether you did or did not, is that right? A. No.

Mr. Macomber: You may cross-examine. [467]

Cross-Examination

By Mr. Grodsky:

* * *

Q. I will rephrase it, it's a little awkward. I will do better than rephrase it, I will abandon it.

Do you recall when the employees put on buttons in the plant for the first time?

A. It was after the holidays.

Q. I didn't mean by date. But it was after the holidays. Now, at the time that the employees put

(Testimony of Peggy Redden.)

on buttons, do you recall whether some employees were wearing IAM buttons and other employees were wearing Mine Workers buttons, in other words, had both kinds of buttons been worn in the plant, is [483] that right?

A. Yes; the IAM had been wearing the buttons all the time.

Q. When you say the IAM had been wearing buttons all the time, do I understand by that you observed IAM employees, members of the IAM who were wearing their buttons, say, in December and in November of 1953?

A. Ever since we have had the union down there, we have had buttons to pin on our employees or the pencil-type buttons and somebody in the plant has always had them on where they could be seen at all times.

Q. Was there any, what was the practice of the employees, let's say, before the holidays? Did most employees wear their buttons or did most employees not wear their buttons, or was it about half and half?

A. Well, I couldn't say.

Q. Well, you observed, didn't you?

A. Well, I didn't count them or anything.

Q. All right. Now——

A. I wouldn't say either half way or——

Q. Was there a substantial number who were wearing their buttons before the holidays?

A. There was enough around to be noticed.

Trial Examiner: Will you describe the button that was worn before the holidays?

(Testimony of Peggy Redden.)

The Witness: Red buttons, as big as your watch there. [484]

Trial Examiner: Let the record show that the witness indicates a conventional size Elgin pocket watch which I have on the table before me.

Mr. Grodsky: Approximately the size of a silver dollar.

Trial Examiner: I would so describe it, yes.

Q. (By Mr. Grodsky): Now, was there any increase in the number of buttons worn by the IAM people after the holidays? A. Yes. [485]

* * *

Redirect Examination

By Mr. Macomber:

Q. One question, perhaps I should have asked on direct examination.

Where do you work in relation to Loraine Evans; where was your station with relation to Loraine Evans' station?

A. My place was down the taping line at the little conveyor.

Q. At any time prior to the discharge of Loraine Evans, were you aware of any disputes or bickering or quarrels down in the general area, regardless of merit? I'm not asking you to pass on the merit of any argument down there.

I want you first to tell me whether you noticed any dissension down in that general area?

A. Yes. [486]

(Testimony of Peggy Redden.)

Q. Describe for the Examiner the extent and nature of that dissension as it came to your attention.

A. Well, it seems like after Loraine got down there in that area there was always an uproar and the girls would come to me.

Trial Examiner: I hate to interrupt, but I'd like to ask you, Mrs. Redden, to be as exact as possible. I realize that very often in describing situations of this kind we fall into the habit of using a word describing the situation that conveys the same meaning to us but may not convey the same meaning to other people.

The word "uproar" conveys a certain meaning to me. I have no idea what it will convey to people reading the testimony or the printed page. Can you describe the situation as exactly as possible?

Mr. Macomber: You may take your time. You don't have to do it in one sentence or anything of that kind.

Trial Examiner: Certainly.

Q. (By Mr. Macomber): Just tell us what you know of the history of any difficulty down there. Don't try to characterize in any one word; tell us when Loraine came in there what happened, what you have seen or heard.

A. Well, after Loraine came into that area, it seems like trouble started. I mean irritating the girls, constantly picking on them and there was always fighting going on in the corner. [487]

Q. What kind of fighting? When you say "fight-

(Testimony of Peggy Redden.)

ing," do you mean argument or physical combat or what? That is what the referee wants to know, tearing of hair among the girls, shouting at each other or what?

A. Just words of you shouldn't do this or you shouldn't do that and running to Mr. Gordon about this here was wrong and that was wrong, the girls were bothering her, and some of the girls, Ellen Graesch and Rita Frey, had come to me and told me that they just——

Mr. Grodsky: I move to strike that before it's even told on grounds of hearsay.

Trial Examiner: I will permit the witness to testify to what communications were made to her to establish the fact of the communications.

Mr. Grodsky: All right.

The Witness: ——that she just couldn't work with Loraine. And I had asked them why they couldn't and they just said they couldn't get along with her.

Q. (By Mr. Macomber): Did this happen long before any campaign, union campaign, started there in December? A. Oh, yes.

Q. When did this trouble start back in that corner in that department?

A. Right after she came to work.

Q. That would have been when, early in '53?

A. Yes. [488]

Q. Now, do you know of anything else of your own knowledge respecting any difficulties that Loraine had back there other than that which you have

(Testimony of Peggy Redden.)

already described to us, a fight or circumstance involving her that you haven't told us about?

A. I know she was called into the office.

Q. How do you know that? Were you there when she was called?

A. Yes, because I had to go and bring up one of the other girls to the office.

Q. What other girl, on what occasion and when? A. Ellen, Rita.

Q. Was that on some occasion of mediating a dispute in the office?

A. Yes, and they called Loraine in there. She wouldn't go in by herself, always be another girl involved in it that would have to go in.

Q. On those occasions where there would be mediating disputes and calling girls, do you know from your own experience, your own observation, what effect that would have upon the other girls working there as to their efficiency?

I'm not asking technical questions, company statistical output or anything like that. Did they seem to be working as diligently?

A. No, they couldn't because there was that irritation around [489] them all the time.

Mr. Grodsky: I will object to that as a conclusion of the witness and not responsive.

Trial Examiner: Sustained.

Q. (By Mr. Macomber): Whether they could have or couldn't have, what was your observation as to whether they did, did they seem to work as

(Testimony of Peggy Redden.)

diligently and assiduously as they would when the disputes were not in progress?

A. If everything was running smooth, why, the rest of the girls was all right. But as soon as something came up, why, naturally, that is going to make them stop to see what's going on.

Q. How frequent were these disputes commencing with Loraine's employment there? Were they a daily occurrence, monthly occurrence, weekly occurrence, hourly occurrence, if you can characterize, how frequent was this fighting or bickering or whatever it was as observable to you back in that department?

A. Well, there was always something going on in that area all the time. All I can say, it was just topsy-turvy back there.

Q. Was this true of any other area in the plant of which you were aware?

A. No; that area back in there by the repair table where Loraine was.

Q. About the time that this union dispute in the plant [490] started to develop back in January, did you observe anything of the conduct or activity of this so-called J. C. Hamilton, who is the brother of Mrs. Evans?

Mr. Grodsky: I'm fascinated by that "so-called" in that sentence.

Trial Examiner: I assume he refers to the fact that he had been referred to by his initials in this hearing.

Mr. Grodsky: All right.

(Testimony of Peggy Redden.)

The Witness: Yes, I noticed that J. C. was doing more running around the plant and he was making boxes and he always had quite a few boxes made up ahead which hid the drinking fountain alongside the rest room over there. And he always watched who went over there, such as Vivian Moore and Jimmie Juhl, and I can't think of his name, a tall, thin guy.

Mr. Grodsky: Pipmeier?

The Witness: Pipmeier. When they was over there to the drinking fountain, he was over there and it wasn't 10 minutes, they talked 15 and run into a half hour sometimes.

Q. (By Mr. Macomber): Would this be on company time? A. This was on company time.

Q. You never overheard the conversation?

A. No, I didn't. And another time there was, I noticed and so did Dorothea, there was a strange man in the plant talking to J. C. We hadn't seen him before.

Q. You don't know who this man was? [491]

A. We didn't at the time. Mr. Harms was on the floor at the time. He got word and went over there and the man left and we found out later it was a United Mine Worker.

Mr. Grodsky: Mr. Examiner, I don't wish to interrupt this but on several occasions there have been some hearsay statements. I don't move to strike them but solely because I know the Examiner is experienced and knows how properly to treat hearsay that is admitted. I don't want to waive any

(Testimony of Peggy Redden.)

objection as to hearsay by being silent. That is all.

Trial Examiner: Very well. I have that in mind.

Q. (By Mr. Macomber): With respect to union buttons, did you see the United Mine Workers members or did your own members at any time here recently remove their buttons or anything of that kind, pass their buttons around?

A. No.

Q. What campaigning or electioneering on behalf of either of these unions have you noticed other than that which you have already told us about for this membership?

A. The United Mine Workers buttons were white and first you'd see them on one, then you wouldn't and then you'd see it on somebody else. I don't know if they all had one or if they passed one around.

Mr. Macomber: You may cross-examine.

Mr. Grodsky: I think maybe we ought to take a short break.

Trial Examiner: Very well. We will recess for five [492] minutes.

(Short recess taken.)

Trial Examiner: The hearing will be in order.

Recross-Examination

By Mr. Grodsky:

Q. Mrs. Redden, you told us about the various things you observed J. C. doing at the plant.

Now, did you talk to your foreman about that?

(Testimony of Peggy Redden.)

A. About J. C., I don't recall.

Q. Did the fact that he had those boxes built up near the fountain inconvenience you in any way?

A. No.

Q. Did it inconvenience any of the employees?

A. Well, they were put too close to the aisle.

Q. Did you complain about those boxes to any representative of management at any time?

A. I don't know if it was to anybody in management for anything, but I do know I told Dorothea and Dorothea called my attention to it, too, that at one time there was a tunnel in the boxes with all kinds of signs which led over to the water faucet at the time the United Mine Workers were in there.

Q. Do you know whether that tunnel was ever brought to the attention of management?

A. Oh, could have been seen, anybody could have saw it.

Q. How long did that continue to exist, how long did you see that in the plant? [493]

A. A day or two.

Q. And how long were these boxes piled up near the water fountain?

A. I think they were five boxes high and I'd say about 10 to 12 rows.

Q. Now, do you know how long this particular condition continued to exist?

A. Quite a while.

Q. You mean a couple of weeks or longer?

A. It was longer than that.

(Testimony of Peggy Redden.)

Q. Do you know whether Mr. Hamilton had prepared those boxes himself?

A. He makes the boxes for the packers.

Q. Yes. Do you know whether he did this under instruction from his foreman?

A. No, I don't.

Q. Now, you testified about a couple of girls, Alice and Ellen, coming to you and complaining, is that correct?

A. Ellen and Rita.

Mr. Macomber: Helen or Ellen?

The Witness: Ellen.

Q. (By Mr. Grodsky): What were they complaining about?

A. That they didn't, couldn't work with Loraine.

Q. Do I understand your testimony to be that you went with them in to see some representative of management about that? [494]

A. I didn't go in with them. I went to the foreman and told him.

Q. You went and told that to the foreman?

A. Yes.

Q. Did you testify about your having gone in once in connection with some dispute to Mr. Simon's office at which time Loraine was involved in some kind of dispute?

A. I didn't go into the office at all for Loraine.

Q. Either for or against Loraine?

A. No.

Q. My notes are a little confused, then. Did you

(Testimony of Peggy Redden.)

testify that she had been engaged in some kind of disputes as a result of which she went to the office?

A. I said that I knew she had went to the office.

Q. You knew that but you hadn't gone in yourself?

A. No.

Q. And you don't know what the problem was in question, do you?

A. Just about fighting with the girls.

Q. Now, do you know which girls were involved in the time that you are thinking about that she went into the office?

A. I knew she went in there on account of Ellen and Rita, that they asked to go in.

Q. Now, do you know what the dispute was in that connection?

A. No. [494]

Q. Do you know if the dispute was between Ellen and Rita?

A. My understanding was that it was between Ellen and Loraine and Rita and Loraine.

Q. You weren't present, though?

A. No, I didn't go into the office.

Q. Do you know of any other dispute with regard to which Loraine went into the office?

A. Over Vina Holst.

Q. You didn't go into the office on that occasion, either?

A. No.

Q. You don't know the nature of the dispute?

A. No.

Q. Do you know of any other disputes between any of the girls in the plant which girls have gone into the office not including Loraine?

(Testimony of Peggy Redden.)

A. The girls I know went in the office with Loraine about fighting.

Q. What I'm asking you now was she always involved in disputes which wound up in the office?

A. Yes.

Q. Now, you know Loretta Brown, don't you?

A. Yes.

Q. She was working on the repair table which was generally under your supervision at the time that she was discharged?

A. I wasn't there the day she was [496] discharged.

Q. I'm not talking about that day but during that period immediately preceding her discharge.

A. They was working on the repair table, yes.

Q. Did you observe her wearing the Mine Workers button? A. No, not Loretta.

Q. Do you recall having a discussion with her in which you told her she'd better take it off?

A. No.

Mr. Grodsky: No further questions.

Mr. Macomber: Did you ever tell anybody to take off their Mine Workers button?

The Witness: No.

Mr. Macomber: That is all. [497]

* * *

MELVIN KRESIN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Macomber:

* * *

Q. (By Mr. Macomber): You have been referred to frequently in the evidence as "Mel," right? A. Yes.

Q. You are one of the foremen at the Essex Wire Corporation and are now and have been a foreman there how long?

A. Since February 11 of '48.

Q. And as such foreman, on or about February 10 of this year, what was the general area of your duties, will you describe them?

A. Overseeing the finished assembly lines in the section, in charge of Department 103.

Q. Did you have any assistants, assistant foremen?

A. Not at that time; three leadwomen. [498]

Q. And was there under your jurisdiction this lady who just testified as Redden, was she one of the leadladies? A. Yes, sir.

Q. What was Betty Cave?

A. Betty Cave worked as relief girl, wire girl.

Q. What were the duties of Helen Greenwood?

A. Helen Greenwood was a wire girl and relief girl.

(Testimony of Melvin Kresin.)

Q. Now, was Loraine Evans in this department over which you were the foreman?

A. Yes, sir.

Q. And what was your relationship, if any, to the foreman who testified here the other day, Gordon, Mr. Gordon, was he a foreman with equal authority in the general area or was he under you or above you?

A. Only over the checkers.

Q. He was foreman of the checkers?

A. That's right.

Q. Did you have any jurisdiction over him?

A. Well, no, I wouldn't say that I have.

Q. And a chap by the name of King, who has been referred to, he was what?

A. I was working under him. I took my instructions from him.

Q. What is King's first name?

A. Kenny. [499]

Q. Did he have jurisdiction over the checkers to some extent?

A. Well, I would say so.

Q. Would or would not?

A. I would say he did have.

Q. And that was the department in which Loraine Evans was also in, is that right?

A. Yes.

Q. Now, on the 10th day of February, and I direct your attention specifically to that date, that being the date that Mrs. Hamilton left or somehow went off the job, calling your attention to that date and about 8:00 o'clock in the morning thereof, or

(Testimony of Melvin Kresin.)

thereabouts, did you see Mrs. Hamilton, see her in the morning?

A. Yes; I saw her on the tape machine.

Q. Was it called to your attention that there was a vacancy in the repair table?

A. Yes, sir.

Q. And who called that matter to your attention? A. Peggy Redden.

Q. And when she called it to your attention, what, if anything, did you do or say to Peggy Redden?

A. I told her I would check to see who we could put on the job that was capable to take care of the job.

Q. What, if anything, did she say?

A. I think I left her at the spur of the moment and I come [500] back to her and we decided we would take Debbie off the conveyor and replace Debbie.

Q. You say "we decided"?

A. I had told her that we would do that.

Q. Let me get this straight. You told Peggy that you would move Ann over to the conveyor, is that right?

Trial Examiner: Let the record be read as to the witness' response.

(The answer was read.)

Trial Examiner: That is what I wanted to hear.

Q. (By Mr. Macomber): You say you left her on the spur of the moment and where did you go?

(Testimony of Melvin Kresin.)

A. I think I walked through the department to see who was available for that job.

Q. I see. You looked around, is that it?

A. Yes.

Q. Did you make the determination that Ann was the person who was available?

A. That's right.

Q. And you made that determination without any consultation with Peggy, is that right?

A. Yes, sir.

Q. And after you made that determination, you went back to Peggy? A. Yes. [501]

Q. And you told her she could use Ann, is that correct? A. That's right.

Q. Now, then, what happened next?

A. Peggy took Ann off the tape machine and she was taken down to the big conveyor.

Mr. Grodsky: Excuse me, I have very great difficulty in hearing the witness. Will you please speak up?

The Witness: Peggy took Ann down to the big conveyor and went down and told the leadwoman on the big conveyor which is Helen Greenwood that she had a girl for her.

Mr. Grodsky: May I interrupt at this point? I suspect there is some hearsay.

Mr. Macomber: I was going to develop that myself. I don't want any hearsay in here, either.

Q. (By Mr. Macomber): Did you observe that, all of this, yourself, did you see when she walked

(Testimony of Melvin Kresin.)

down with Ann or is this something somebody told you?

A. I can't say I stood right there and saw her go over when I instructed her.

Q. I want you to know that through all my questions and through all of counsel's questions, certainly the Examiner is interested in only knowing what you saw and what you heard. If they want to know what somebody else told you, they will ask specific questions. You try to limit yourself. I realize it is difficult, to what you saw and what you heard. [502]

With that in mind, you went back and you told Peggy to take Ann, is that right? A. Yes.

Q. Did you then see what Peggy did with Ann?

A. No, I didn't.

Q. When was it—next, did you see Ann go over to the conveyor belt?

A. I saw her working on the conveyor belt.

Q. Did you see her walk over there and assume any position? A. No.

Q. Did you tell Peggy to what job, what specific job over there on the conveyor Ann was to be assigned to or was it just left vaguely the conveyor?

A. Well, filled in wherever we was short, a girl that happened to be absent, the station that was short.

Q. Did you direct her to put her on any particular station or did you just say take Ann?

A. As I recall, I told her to put her on take-off.

(Testimony of Melvin Kresin.)

Q. Do you know what the practice was with respect to that station at that time, whether take-off stuck to the one job or whether there was any rotation?

A. Well, here was some rotation. We had quite an absenteeism and we usually, I picked the girls from places where I could spare them to fill in. This was our problem to keep it filled with girls. Girls would be out and we would [503] take them from other jobs to fill in.

Mr. Grodsky: I move to strike the answer on the grounds it is not responsive.

Trial Examiner: I will permit the answer to stand.

Q. (By Mr. Macomber): What I want to know particularly is whether—when I refer to the take-off station, I don't want to know whether there is a girl stuck in this position when someone is absent.

What I want to know is whether there was any practice among these girls at that time to change position among themselves to share either hour by hour, day by day or week by week or any other basis?

A. Well, yes. They changed off to different places. When a girl went to work we usually put them where they were fitted best for the job.

Trial Examiner: Mr. Kresin, Mr. Macomber's question was, was there a routine of rotation or was it done on more or less of a basis of need? You have indicated in your testimony that shifts were made on the basis of need.

(Testimony of Melvin Kresin.)

His question is, were they done on any other basis, on the basis of a routine rotation?

The Witness: No, there was no routine.

Q. (By Mr. Macomber): Now, before Ann went over to the station, did she say anything to you or you anything to her further than you have already indicated? [504] A. No, sir.

Q. Were you there during the hour or so that intervened between this event and the break period at 10:00 o'clock? A. Do you mean at the job?

Q. Yes, were you acting and serving as foreman?

A. Yes, all through the department. I went through the particular area passing by.

Q. You were what?

A. I was passing through there.

Q. Did you observe Ann Hamilton, say, between 9:00 and 10:00 o'clock just before the break period?

A. Would you repeat that, please?

Q. Did you see Ann while she was working on the job, that is, conveyor No. 1 before the break period? A. Yes, sir.

Q. Just describe generally what you observed of her activity. A. She was doing the job.

Q. She was doing the job. Did she appear unhappy, did you notice anything unusual?

A. Just by passing by, I didn't observe anything.

Q. Did she complain to you at any time before she left, that is, before the break period, was any complaint made to you about the job or about any

(Testimony of Melvin Kresin.)

disturbance at the table? A. No, sir.

Q. Can you tell us whether or not the girls were instructed [505] that they were to complain to the foreman if any difficulties developed on the job, what was the practice in that connection? Let's say a girl was working on a job like that Conveyor No. 1 and the other girls started to torment her or even render her operation inefficient in such case, what were they instructed to do, if anything, to whom was she to complain?

A. To complain to the foreman and grievance committee.

Q. That would be the committeewoman?

A. Yes, sir.

Q. Was any complaint made to you before 10:00 o'clock? A. No, sir.

Q. By the way, had you always been friendly with Ann Hamilton, gotten along with her?

A. Yes, sir.

Q. Never had any difficulty with her at all?

A. No, sir.

Q. She was always reasonably efficient, an efficient worker, I take it? A. Yes.

Q. Now, what is your rule, if any, of proper procedure at that time with respect to girls leaving the factory?

A. Well, that depends on if they were leaving on business or sickness.

Q. Let's say leaving on sickness, let's start with that. Suppose a girl was leaving on account of sickness, what did she [506] do?

(Testimony of Melvin Kresin.)

A. I give them a pass up to the first aid room if they were sick. On business passes, the foreman, if he saw fit, could give passes to leave the factory for business on his own but as far as being sick or not feeling good, that always had to pass through the first aid room and check with the nurse.

Q. So far as you know were there any departures to that rule or those rules?

A. So far as I know, no.

Q. Now, at or about 10:00 o'clock on the morning of February 10, did you see Ann Hamilton, see her on the break period? A. Yes.

Q. Just tell us the circumstances under which you saw her.

A. The signal had rang, five-minute signal to go back to work. I happened to be in the aisle right at the tables and she met me there and told me she wasn't feeling well and wanted to go home.

I says, "Ann, I can give you a pass to go to the nurse. I cannot issue a pass to leave the factory, if you are not feeling well. You have to go through the nurse."

I told her I hated to see her leave, but if she was feeling bad, by that time she turned around and walked away from me. I told her I would issue a pass for the nurse.

Q. For the nurse. Did she make any comment when you said you would issue a pass for the [507] nurse? A. No, she walked off.

Q. Did she say anything about what was ailing her?

(Testimony of Melvin Kresin.)

A. She said, "What is ailing me the nurse cannot do anything for me."

I said, "Well, I still have to give you a pass for the nurse."

Q. After that, she just walked out?

A. She left.

Q. And did you tell her at any time, "I will make out a pass for you. You may go"?

A. I did not tell her that. I said I would make out a pass to go to the nurse. As far as leaving the factory, no.

Q. So when she left, what, if anything, did you do, was this incident reported to any of your superiors?

A. Well, I went back to the department. It was time to go to work and they said they was short a girl over there where Ann was so I went to the nurse's office to check to see if she come in to see the nurse.

Q. The nurse said she hadn't come in?

A. Then I went back to the department. She wasn't back there so——

Q. Who did you check with when you went back to the department?

A. Nobody in particular. I just walked through the department, didn't see her. [508]

Q. How long did you wait before determining that she was not coming back, when was it apparent that she was not coming back?

A. If I recall right, the nurse said she saw her go out the front gate.

(Testimony of Melvin Kresin.)

Q. Now, did you subsequently, that is, I mean, at some later period, have an occasion to report this incident to some, to one of your own superiors?

A. Yes, I told Kenny King.

Q. You told King that? A. Yes, sir.

Q. When did you tell him?

A. Oh, within a half hour or so afterward, approximately that.

Q. Did you tell him just what you told us here now? A. Yes, sir.

Q. Did you have occasion to tell any of your other superiors about the incident of Mrs. Hamilton's departure? Did you talk to Mr. Simon about it, then, within the next 24 hours or report it directly to Mr. King?

A. I talked directly to Mr. King.

Q. Did you make any determination, or King, up to that point as to what you were going to do with Mrs. Hamilton? A. No, I didn't.

Q. When did it come to your attention that Mrs. Hamilton's card was pulled? She testified the next day she came back to [509] work and her card was gone. Now, were you there the next day?

A. Yes, sir.

Q. Did you know that her card was gone?

A. Yes, Mr. King, I think, Mr. King told me that her card was pulled out of the rack.

Q. King told you that?

Trial Examiner: Did he tell it to you on the 10th or the morning of the 11th?

(Testimony of Melvin Kresin.)

The Witness: It was on the 10th, somewhere around noon.

Q. (By Mr. Macomber): Did he tell you at that time he pulled her card or was going to pull it or what? A. Well——

Q. If you don't remember, say you don't remember. A. I just don't remember.

Q. You are just not sure? A. No.

Q. What is your best recollection?

A. About the card being pulled?

Q. Yes; what is your best recollection?

A. I was thinking it might have been the next day that he told me that.

Q. She says the next day she came in there and her card was gone and, I think, she went to see you.

Mr. Grodsky: Mr. Examiner, I object to that as direct examination. I have been permitting a lot of leading and [510] suggestive questions and I have made no objections to it.

Mr. Macomber: I will withdraw the question. I thought I was expediting things. If there's an objection, all right.

Q. (By Mr. Macomber): The next day, did you see Mrs. Hamilton? A. Yes.

Q. About what time?

A. As I was on my way to work, coming in the plant, walking down the aisle to go back to my department.

Q. What person or persons were present if anyone besides yourself and Mrs. Hamilton?

(Testimony of Melvin Kresin.)

A. Well, there were several people sitting by the tables. We were directly in the center of the aisle.

Q. Do you recollect any conversation with her at that time? State what she said and what you said. If you don't know the precise words, give us the substance of the conversation.

A. She asked why her card was pulled and——

Q. What did you say, if anything, to that?

A. If I remember, I told her I didn't know why her card was pulled and she'd have to see Mr. Harms.

Q. Mr. Harms. Did you have any further conversation with her at that time?

A. No; she turned around and walked over to the table and I went on back to my department.

Q. When did you next see her, if at all, to discuss that matter with her? [511]

A. I had no more discussion with her.

Q. Let me ask you this question: When you asked Mrs. Hamilton to go over to the Conveyor No. 1, or directed that she go over, did you have any idea in mind of discriminating against her because of any union activity?

A. No, sir. I felt that that was her business or anybody else's that was working in the department.

Q. Whatever they did was their own business as far as you, personally, as far as the company was concerned?

A. I did tell Ann that I didn't want any campaigning going on on company time while we were working.

(Testimony of Melvin Kresin.)

Q. When did you tell her that?

A. That morning.

Q. What prompted that, what occasion, circumstances, provocations?

A. I had been off sick and they said there was a lot of campaigning going on interfering with the work.

Q. Somebody else told you that? A. Yes.

Q. All right. So what?

A. That was Mr. King who told me that.

Q. So?

A. So I walked through the department and saw some pins being worn, some union pins. I told her I didn't want any campaigning going on in the plant on the company's time. [512]

Q. Did you tell her to remove her pin or button?

A. I did not.

Q. You did not? A. No, sir.

Q. Did anybody with the company, King, or Simon or anybody else ever instruct you to tell people to remove their pin? A. No, sir.

Q. Did you have occasion to observe Loraine Evans after she came to work there in her relationship with her fellow employees in the department in the department in which she was employed?

A. It seems as though there was quite a lot of confusion down at that end of the department quite often. Girls that replaced on machines, taping machines, had asked to be moved off of them. Different girls asked to work away from the area, didn't want to work down there. And we did move one checker

(Testimony of Melvin Kresin.)

up to the other end of the line because she refused to work down there.

Q. Now, what, if anything, did you observe of Mrs. Evans as might bear upon the question of any disputes in which she may have been engaged, did you ever hear any arguments or see any fights in which she was involved, loud talking or anything of that kind?

A. No; there was one morning that I had passed through where they were working and this Loretta and Loraine, seems [513] as though they both said something to me about calling one another different names.

Trial Examiner: Can you place the time?

The Witness: The exact time?

Trial Examiner: Well approximately the time.

The Witness: Oh, along in the morning. I can't say exactly.

Trial Examiner: What time of year?

The Witness: This was just a day or two before they left the plant.

Q. (By Mr. Macomber): What did you observe of that dispute?

A. I told Mr. King about it, told them there was feuding going on back there and the girls were not getting along. They had been working together and helping one another out and stopped that, wouldn't help one another. So I went and told Mr. King about it.

They were not getting along so he told me to have

(Testimony of Melvin Kresin.)

them brought up to his office and he talked to them from there.

Q. Do you know what transpired there with him or was that out of your presence and hearing?

A. I was in there.

Q. What took place?

A. Well, he told them that they had had their last warning out there and they had had a warning several times but this last warning evidently was put out while I was off sick and [514] they had made a note of it and sent it to the personnel file. I was told that they were not to have any more work after that one. They had on file a note stating no more warnings.

Q. Did you see that note?

A. No, I didn't.

Q. Proceed, what further was said, if anything?

A. He told them they had been warned several times and this was it. There would be no further warning. This was it, they were through. Mr. King told them they were through because they had the final warning, because it was on paper and there would be no more warning. They were through.

Q. You told us in substance all you observed of the activity back in the area in which Loraine worked?

A. Yes; only just hearsay.

Q. I take it that you kept hearing reports concerning difficulties?

A. Yes, sir.

Q. What was your observation as to the efficiency of that department or that area during the times that these disputes were in progress?

(Testimony of Melvin Kresin.)

A. Well, I would say the girls that had to work right in that area were bothered by the confusion back there all the time, could not do their job the way it should be done.

Q. And had this difficulty, these difficulties concerning which you have been testifying, did they take place before any [515] outright break of inter-union conflict along about the first of the year?

A. Before that.

Q. Yes? A. Yes, sir.

Q. When did that commence, according to your observation with relation to when Loraine Evans' employment commenced?

A. Seemed like it started after Loraine went over in that checking section.

Q. Had there been any trouble in that section before Loraine went over there that you observed?

A. Well, no, not that I heard too much about it.

Trial Examiner: The question is whether you observed.

The Witness: No.

Q. (By Mr. Macomber): Now, along about the first of the year or thereabouts, or you tell me, did there start the beginning of a campaign between these two unions that are the subject of our discussions here?

Mr. Grodsky: I will object to the form of the question.

Mr. Macomber: It is awkward. I will withdraw it.

Mr. Grodsky: What I have specifically in mind

(Testimony of Melvin Kresin.)

is we ought to get the witness' own testimony as to the time when it first came to his attention.

Mr. Macomber: Sure.

Q. (By Mr. Macomber): You tell us, in your own words—I [516] will leave you some room to work in here, when did you first notice an outbreak of union activity, what it consisted of, how it manifested itself, go ahead.

A. Well, it seemed as though there were certain spots in the area, for instance, the water fountain behind the boxes, a lot of gathering going on. Saw some cards wrote up, cards held up on the rack, writing on them. I didn't go and check.

Q. Who was doing this?

A. J. C. and several others.

Q. What about Juhl?

A. Yes, he was in there. I remember seeing him in there.

Q. Was that on company time?

A. Yes, on company time.

Q. Where?

A. In the plant by the water fountain and had the cards by the wall. I couldn't go see on the cards, what they was writing on it.

Trial Examiner: You say Mr. Juhl was in that area of the plant at the time the cards were being held up on the wall?

The Witness: Yes, sir.

Trial Examiner: Very well.

Q. (By Mr. Macomber): When did that start, when did that campaigning start?

(Testimony of Melvin Kresin.)

A. Oh, say, in January some time.

Q. How did it manifest itself in ways other than which you [517] have described, describe what the conduct of various employees and what the various reactions would be, if you know.

A. Several of my girls working for me asked if they had a right to wear pins. I said I had no jurisdiction over that, could wear them if they cared to.

Q. As I understand your answer, you said some of the girls said they had no right to wear pins and you told them you had no jurisdiction, they could wear them if they liked, is that right?

A. Yes.

Q. Did you ever tell anybody that they had to take off a pin? A. Never.

Q. Shortly after the outbreak of the campaigning activity, such as you have described, did you see any bulletins posted on any company bulletin boards relating to the subject of no campaigning?

A. Yes, I did.

Q. Approximately when was that with relation to the outbreak of the beginning of the campaign?

A. Well, the exact date is along the middle of January, right along after the negotiating.

Q. I show you General Counsel's 2. Do you know whether something like that was on the bulletin board at about the time that you have described?

A. This was up on the safety board. [518]

Q. You say this was up on the safety board?

A. Yes.

(Testimony of Melvin Kresin.)

Q. Where is the safety board?

A. The front part of the office, the bulletin board.

Q. Is that where the employees come in?

A. Yes.

Q. Do you know how long it was there?

A. Well, no, I couldn't say.

Q. This company rules and regulations called Respondent's Exhibit No. 1, do you recall seeing any rules and regulations posted on the board somewhat similar to that exhibit?

You don't have to read the whole thing. If you don't recognize it, just unhesitatingly say you don't recognize it.

A. There has been bulletins on first aid and how they were to go about leaving the factory, what they were to do, what procedure they were to take. I think everybody in the department is familiar with it. There were bulletins posted to that effect.

Q. Were there some other kinds of bulletins posted about rules as it pertained to leaving the factory?

A. Yes; the rules were posted that all employees were to have a pass from the department to leave the factory on business. That could be done by the supervisor or foreman but if they were to leave the factory stating that they were sick or didn't feel good, they were supposed to get a pass [519] from the nurse.

Q. Do you recall whether or not the employees first engaged by the company, if they were advised

(Testimony of Melvin Kresin.)

as to the company rules as to whether the foreman or immediate superior customarily tell them about these rules?

Mr. Grodsky: I will object to that except insofar as it was his custom to do anything.

Q. (By Mr. Macomber): Do you know whether there was a practice in the company to do that?

Mr. Grodsky: I will object to that, no proper foundation.

Trial Examiner: Overruled.

The Witness: What is the question?

Trial Examiner: Will the reporter please read the question?

(The question was read.)

The Witness: Yes, I would say there was.

Q. (By Mr. Macomber): What was the practice? A. Factory leave practice was——

Q. I don't think you understand my question. My question was, was there any custom or practice which the company had when it engaged an employee of telling them about the company rule which related to the procedure of leaving the plant?

A. I usually told the girl myself when I got a new girl, a new employee. I would tell her what the practice was.

Q. Do you know whether you hired [520] Hamilton? A. No.

Q. Do you know who the foreman was who engaged her, took her under his wing after she was employed?

(Testimony of Melvin Kresin.)

A. Well, let's see, she was hired in the office and then brought out to me. I put her to work.

Q. Do you know whether you told her about this rule as it pertained to leaving the plant?

A. That I don't recall.

Mr. Grodsky: Mr. Examiner, aren't we just tinting windmills? I think Mrs. Hamilton testified she was aware of the rules. So what's the point?

Mr. Macomber: Yes, she did. With that understanding, I won't pursue that any further. I think that is very true.

Q. (By Mr. Macomber): Now, with respect to these leadworkers, were they authorized to move anybody about from job to job without first consulting you and entertaining your authority?

A. They usually always come to me and ask if it would be all right to put a certain girl here or a certain girl there to fill in wherever they needed replacement.

Q. I see. Now, with respect to the subject of gloves——

Trial Examiner: Before we pass, you testified at the outset of your testimony here that rather than have an assistant or assistants in your department, there were three leadladies. You identified only one by name. Can you identify all three? [521]

The Witness: Peggy, Helen Greenwood, and Betty Probs.

Q. (By Mr. Macomber): Those girls themselves were engaged in production work, were they not, the leadgirls? A. Yes.

(Testimony of Melvin Kresin.)

Q. Now, with respect to the subject of gloves, do you know what the practice was with respect to gloves in connection with the take-off operation on Conveyor No. 1?

A. Well, there wasn't only the take-off that wore gloves. They wore gloves on different operations on the conveyor.

Q. What instructions, if any, did the girls have relating to gloves?

A. Usually ask me if I were in the area or ask the leadlady. The leadlady, in turn, come to me and order gloves and I get them.

Q. What instructions did they have about what they were to do with the gloves when they were through with them?

A. Turn the old gloves back to me. I turn in the old pair and get a new pair.

Q. If a girl wanted gloves on the Conveyor No. 1 operation, of whom would she make a request for gloves?

A. Either me or the leadwoman.

Q. What is necessary to physically obtain these gloves?

A. Well, have to go to the janitor's supply office and get the gloves.

Q. The janitor has the key to that? [522]

A. Yes, sir.

Q. You have to—you have the key to it, also?

A. Yes.

Q. Do you have to dig out the janitor in some way or other in order to get out the gloves, is that right?

A. Yes.

(Testimony of Melvin Kresin.)

Q. Do you know anything about the, anything first hand about the glove situation on the morning of February 10?

A. Betty Cave asked for gloves and, as I recall, I went out to get the gloves shortly after she asked for them.

Q. Do you know when she asked for them, at about what hour in the morning?

A. Well, I would say around 9:00 o'clock.

Q. And then after she made this request, what did you do?

A. I went out to find the janitor to get the gloves.

Q. And how long were you doing that?

A. I would say ten minutes.

Q. Did you find the janitor? A. Yes, sir.

Q. Did he give you the gloves? A. Yes, sir.

Q. What did you do?

A. Brought the gloves back and gave them to Betty Cave. As far as I remember, her or Helen Greenwood, the leadwoman.

Q. And you gave the gloves to them. What did you see them [523] do with them?

A. No, I didn't.

* * *

Cross-Examination

By Mr. Grodsky:

Q. Now, when Loraine first went to work for Essex Wire, were you her first foreman?

A. Yes.

(Testimony of Melvin Kresin.)

Q. And then after a while she was transferred from the job she had with you to working as a checker, is that correct? A. Yes.

Q. After she was transferred and working as a checker, did she come to you and complain about the girls working back there?

A. That I don't recall.

Q. Do you remember her telling you specific stories as to what the girls were doing back there, do you remember telling her that she ought to knock them in the head?

A. No, I don't recall that.

Q. You don't recall anything like that, you don't recall her ever telling you about the trouble that the girls back there were causing her?

A. Well, she had mentioned it a time or two, yes. The exact [524] words, I don't know.

Q. I'm not asking about the exact words, but she did mention to you that the girls back there were causing her trouble?

A. I can't say. I don't remember whether she said they were causing her trouble or whether there was trouble back there.

Q. You don't recall telling her to knock them in the head?

A. No, sir; I don't talk to people like that.

Mr. Macomber: What was your answer?

The Witness: I do not talk to people like that.

Q. (By Mr. Grodsky): Then you don't think you said that? A. No, I know I didn't.

Q. You indicated Ann was a good worker?

(Testimony of Melvin Kresin.)

A. That's right.

Q. In fact, you complimented her on her work?

A. I do all the women when I see they are doing their part and doing a good job. [525]

Q. Now, after Ann left the job that morning you had a problem of putting someone on the take-off position, didn't you?

A. Yes; I had to replace her.

Q. Whom did you replace her with, if you recall?

A. Betty Cave.

Q. Did Betty stay on that job the entire day?

A. I believe she did. [527]

* * *

Q. Are you familiar with the figures sufficiently at this time to be able to tell us whether during the months of January and February production was in any way curtailed by the union activity?

A. Well, our production had fallen off.

Q. You testified that you observed J. C. Hamilton and Juhl and Gerald Pipmeier, I believe, engaging in some activity other than working during working hours?

A. Yes, sir.

Q. During January?

A. Yes, sir.

Q. Did you call this to the attention of any foreman, their own foreman, for example?

A. I reported it to Mr. King. [536]

* * *

Q. Now, you testified that at a certain time various girls asked you about the right to wear pins.

(Testimony of Melvin Kresin.)

We have had other [539] testimony here that the IAM pins were worn right along in the plant.

Is that in accordance with your observation?

A. Yes.

Q. You have seen people with IAM pins right along? A. Yes, sir.

Q. What girls was it that asked you if they may wear pins?

A. Peggy was one girl asked me if they had a right to wear pins. If I recall, Dorothea Randall was one of them that asked if they had a right to wear union pins.

Trial Examiner: Specify which pins you are referring to.

The Witness: Mine Workers pins is what they were talking about, if I seen them.

Q. (By Mr. Grodsky): In other words, these people were not asking about the right of individuals to wear IAM pins, but were asking about the rights of workers in the plant to wear UMW pins. Your answer was that that was what they asked you.

Do you know when was that in terms of date or in terms of any other incident which may have happened? A. You mean about the pins?

Q. Yes.

A. Well, they just asked me if they were allowed to wear the pins on the job and they didn't like to work along with them if they were going to wear a different union pin in the plant.

Q. All I'm asking you is when that happened.

(Testimony of Melvin Kresin.)

Do you have [540] any recollection of the time or date?

A. Well, the middle of January, I would say, somewhere along there. I don't know the exact date.

Q. Was it after the employees started wearing UMW pins? A. Yes.

Q. Was it long after or just as soon as they put them on?

A. Well, I don't know how long they wore these pins before I came back to work. I was off sick for a month before that.

Q. I see. When did you return to work, do you know?

A. I was off three weeks. I don't remember the exact date.

Q. Would it refresh your recollection if I suggest you returned to work on February 8th? Would that sound right to you?

A. It was on a Monday.

Q. That happens to be a Monday, but don't let that encourage you. A. Yes.

Q. I just want your recollection.

A. It was on a Monday.

Q. Did I have an answer?

Trial Examiner: The witness indicated he only remembers it was on a Monday.

The Witness: The date, I wouldn't know the date.

Q. (By Mr. Grodsky): Would it help you if I suggest you came back to work two days before the incident when Ann left the plant? [541]

(Testimony of Melvin Kresin.)

A. It was the same week.

Q. When you were asked by Peggy and by Dorothea whether employees were permitted to wear Mine Workers pins, did you check with higher authority? A. Yes; I checked with Mr. King.

Q. And I presume that what you told them is what Mr. King told you, is that correct?

A. Yes. I told the girls that we could not ask them to remove the pins. That was their privilege if they wanted to wear the pins.

Q. Have you observed the girls who work in the take-off position on Conveyor No. 1?

A. You mean about the work?

Q. Yes, about how they go about doing their work? A. Yes.

Q. And will you describe for us what is involved in their job there?

A. Well, they start at one end of the jig. All the wires in individual wires, in the first place, are hooked up on the jig in position to hold them in place and when it comes around to the take-off girl, she starts to take the end of the harness, lift it up, and gets it lifted up and puts it on the overhead conveyor.

Trial Examiner: Let the record show the witness in giving that description indicated by lifting his hands, that [542] the take-off girl employed a lifting motion on at least three occasions as the witness performed the operation moving his hands from left to right and indicated by moving the

(Testimony of Melvin Kresin.)

arms in the lifting operation performed in putting the harness on an overhead conveyor.

Q. (By Mr. Grodsky): Did you observe that the girl who does that wears gloves?

A. Well, usually they ask for gloves if they want them. A lot of girls don't. I have had a lot of girls that have taken harnesses off for some time and never ask for gloves. The majority of girls who work on that station ask for gloves.

Q. Do you think it's the kind of operation on which gloves are helpful?

A. Well, if I was doing the job I wouldn't want gloves.

Trial Examiner: You would?

The Witness: I would not.

Q. (By Mr. Grodsky): May I inquire why you wouldn't want gloves?

A. Because I wouldn't feel I would have to have them.

Mr. Grodsky: I have no further questions.

Mr. Macomber: Just one question.

Redirect Examination

By Mr. Macomber:

Q. Do you know how much those harnesses weigh that come off the take-off point on Conveyor No. 1, the big conveyor? [543]

A. I would say around five pounds, somewhere in that neighborhood.

(Testimony of Melvin Kresin.)

Q. And how much do they weigh coming off Conveyor No. 2?

A. I guess a regular harness off No. 1—I never weighed one—would weigh around seven pounds.

Q. What about No. 2?

A. Three, four pounds.

Q. Now, the lifting operation, such as it is, how much do you lift?

A. I wouldn't say it was a lift. All they are doing is unhooking the wires off the peg—a peg about that long—where the terminals hook off, just unhook the terminal.

Trial Examiner: Let the record show the witness indicated by using his fingers that the pegs over which the terminals are hooked are approximately two and a half inches long and that the terminals are removed from the hooks by the lifting motion, palm upwards.

Q. (By Mr. Macomber): The lifting motion is how much of a lift, how high up does it start?

Trial Examiner: I described the witness' motion. The witness moved his hands, I should say, in an arc, approximately four or five inches.

Mr. Macomber: Right. That is all.

Recross-Examination

By Mr. Grodsky:

Q. In some instances there are more than [544] one wire, that is, more than one wire with a terminal in a given prong or position, isn't that correct? A. You mean a peg?

(Testimony of Melvin Kresin.)

Q. Yes. A. Oh, yes.

Q. And it's easier to remove them or, I will ask you, is it easier to remove them if they are put on loosely than if they are packed down?

A. It doesn't make any difference. You put the wire on and it drops down on the peg.

Q. If you have two or three or more wires on a peg, is it your experience that when you drop one on top of another one that it will go down just as far as if you were to press it down physically?

A. All the wire will drop down to the bottom of the peg on top of one another.

Q. The question that I asked you, though, is if someone were to push down on the wires, would that make a difference? A. No difference.

Q. It wouldn't make any difference, in your opinion? A. No difference.

Q. How many wires are there on the average harness—strike that. Not the harness but the completed assembly on the No. 2 conveyor?

A. No. 2 conveyor. How many individual wires? [545]

Q. Yes. A. Six.

Q. And on a number one conveyor, I understand that they run upward from about 30?

A. That's right.

Q. And am I to understand that the weight of the completed product of the No. 2 conveyor which has only one-fifth of the wires weighs about one-half of the weight?

A. I would say a little less than half.

(Testimony of Melvin Kresin.)

Q. But fairly close to half, more than a third?

A. I would say less than half. Wouldn't be a full assembly. Part of the subassembly that goes into the big harness. [546]

* * *

BETTY CAVE

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Macomber:

* * *

Q. You have worked with Essex Wire since when? A. March 30, 1953.

Q. You have been a what with them?

A. I have been a wire girl and relief girl which is assistant to the leadlady.

Q. What are you now?

A. Relief girl to the switch line. [556]

* * *

Q. All right. Now, there's been something in the testimony, I think, particularly of Loraine Evans to the effect that sometime or other prior to her discharge there was passed through the plant a petition or petitions which the girls represented to be a T.V. petition or something of that kind?

A. That is correct.

Q. Will you tell us what you know about that subject?

(Testimony of Betty Cave.)

A. It is rather humorous. We have a German woman in our group who is very fond of polka music and has interested a [564] number of the girls in our plant in the polka music, the program that is going on. They were first starting up this program and, naturally, she wanted to show that we were interested in the program so on company time we signed—it wasn't a petition, it was a piece of paper requesting for more polka programs to be on the television. That was circulated on company time without knowledge of the supervisors.

Q. So that as far as you know, it was without their knowledge? A. Yes, yes.

Q. Now, did you have any discussion with Loraine about that petition at any time?

A. I don't believe I did.

Q. Was your station, I take it from the evidence your station was relatively close to Loraine's station?

A. My actual station was not. During the course of my work I came in contact, fairly close to [578] Loraine.

* * *

It was brought to my attention that I see it. So I walked to her machine and looked at her button and asked her where her other union button was. She said it was in her pocket and I said that was a good place for it, turned around and walked off.

Q. Did you ever tell her to remove her button?

A. Never did.

(Testimony of Betty Cave.)

Q. When was that, in January?

A. It was in January. The charges were filed on that date. I believe it was approximately the 7th or 8th of January.

Q. Did you ever tell anyone to remove a button?

A. Never did.

Q. Did you ever overhear anyone with management ask anyone to remove a button?

A. No. [579]

* * *

Q. (By Mr. Macomber): You saw some company rules posted on the bulletin board, is that right? A. Yes, sir.

Q. Did you see a bulletin on the board there sometime along in January or February, you tell me when, advising the employees, in effect, that no campaigning was to go on on company premises on company time?

A. Yes, I did. It was approximately the middle of January.

Q. And when did that appear with relation to the start of this war between the United Mine Workers and the IAM?

A. I believe that was posted approximately two weeks after the starting of the campaign.

Q. How did this friction between these two unions first manifest itself, in what form did it manifest itself in the factory, as you recollect?

A. There was an awful lot of dissension. Where the needling came from, I don't know. By that, I mean that somebody was agitating all of the people

(Testimony of Betty Cave.)

not only on our side but throughout the plant. We had a man on nights who did a lot of agitating and, therefore, it just kept getting bigger and [580] bigger like a snowball.

The girls would come to me and ask if they had to work under such conditions. My only answer was, "I don't know." [581]

* * *

Cross-Examination

By Mr. Grodsky:

Q. Now, is it Miss or Mrs. Cave? A. Mrs.

Q. Mrs. Cave, you told us about one petition that came to your attention that was passed around. Do you recall another petition that was passed around during the period of this union activity? [586]

* * *

A. Yes.

Q. And what was this petition about?

A. I have no idea.

Q. You weren't asked to sign it?

A. I signed it.

Q. You signed it?

A. Yes, it was for an interview with Mr. Simon.

Q. That's right. It was for an interview with Mr. Simon. Who asked you to sign it?

A. I don't recall as anyone did. It was passed from station to station and I signed it.

Q. Do you know whether it was passed to everybody? A. I have no way of knowing.

(Testimony of Betty Cave.)

Q. You have no way of knowing? A. No.

Q. Do you remember what was written on that petition? A. I do.

Q. What was written on that petition?

A. It was typewritten that "We, the undersigned request an interview with Mr. Simon."

Q. Do you know what the interview was supposed to be about?

A. I have no way of knowing.

Q. You don't know who asked for the interview? A. Beg pardon?

Q. You don't know who asked for the interview? [587] A. No.

Q. You don't know who started the petition?

A. No.

Q. All you know is that you signed the petition?

A. That's right.

Q. At your work station?

A. Yes, I was relieving at the time.

Q. And you passed it on to the next girl?

A. It went right on the conveyor to the next girl.

Q. Did you observe what happened to it after all the girls on the conveyor had signed it?

A. I don't remember having seen it after it left my station.

Q. I see. Do you know approximately what time that petition, by the time, I mean what date, roughly? A. The date?

Q. Approximately. A. Oh, gee——

Mr. Macomber: I can take a lot of mystery out of this. I have some of the petitions. I don't have

(Testimony of Betty Cave.)

the date. It will save a lot of time asking about this. I have them here.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

During the period of discussion off the record the document previously mentioned by Mr. Macomber as [588] being copies of the document referred to in the cross-examination have been submitted to Mr. Grodsky and he has had an opportunity to inspect them. I understand he is in a position to proceed.

Mr. Grodsky: I wish to offer, I don't wish to offer these documents in evidence. I merely wish to describe them and propose a stipulation with reference to them that they are two documents on lined paper, perforated with three holes on the side as notebook paper, that both of the same have a type-written legend at the top which reads, "We, the undersigned wish an interview with Mr. Simon," and they are signed by approximately 75 names, is that right?

Mr. Macomber: I don't know. I haven't counted them.

Mr. Grodsky: Let's say over 50 names.

Mr. Macomber: Yes, over 50.

Mr. Grodsky: Over 50 names.

Mr. Macomber: Purports to be signed. We don't know whose signatures they are. They purport to be the signatures of 50 employees or over.

(Testimony of Betty Cave.)

Mr. Grodsky: That's right, including the name of Betty Cave. And this is your signature, is it?

The Witness: It is.

Trial Examiner: So stipulated?

Mr. Macomber: So stipulated.

Mr. Grodsky: So stipulated. [589]

Trial Examiner: Very well, the stipulation is noted for the record.

Q. (By Mr. Grodsky): The first name on top as one that signed is Dorothea Randall. Are you familiar with her signature? A. I am.

Q. I show you this document and ask you if that is her signature. A. Yes, that is it.

Q. Now, getting back to the question of date of when you signed this, I'm not interested in the exact date, I'm sure you couldn't recall it.

A. I couldn't recall it.

Q. Take, for example, a period of time when the notice was posted on the bulletin board or, for example, the date when Ann Hamilton walked off the job or any other thing that happened at that period that has come into the hearing, can you relate it to that in some way?

A. My best recollection would be before the notice.

Q. Before the notice was posted and after the employees had become aware of activity on behalf of the Mine Workers in the plant?

A. I would say so.

Q. Now, you mentioned at one point as a point of reference that at a certain time charges were filed

(Testimony of Betty Cave.)

against Ann [590] Hamilton. Now, were you referring to charges filed with the IAM?

A. Yes. Charges were filed against a number of the people for unionism.

Q. That included Ann Hmilton, also, included Loraine Evans? A. It did.

Q. How long after the charges were filed was there a trial, if you know, in terms of time?

A. Approximately two weeks.

Q. And none of these people appeared at their trial, did they? A. No.

Q. They were expelled, weren't they?

A. They were.

Q. At the time that they were expelled, Ann was already no longer working in the plant, was she?

A. I believe she had terminated.

Q. She had been terminated? A. Yes.

Q. Loraine was still working in the plant, wasn't she? A. Yes.

Mr. Macomber: I assume it is understood that any evidence relating to action which the union may have taken unilaterally or bilaterally against either of these people out of the presence of management would not reflect upon management?

Trial Examiner: It would not be [591] considered.

Mr. Macomber: Not binding and without making the formal objection, I understand that is the way the Examiner thinks, assuming that we are not bound with that sort of thing.

(Testimony of Betty Cave.)

Mr. Grodsky: This document is merely for the purpose of trying to establish a date if possible.

* * *

Q. Do you think, does this in any way refresh your recollection that the charges—strike that.

Could you by thinking back to the time when the trial had been completed determine how long before that the charges were filed?

A. I believe the first charge that was filed was dated January 25 or 28 which was not against either of the girls.

Q. Yes.

A. And within approximately a week's time, from the 25th to the 1st, thereabouts, I suppose the charges were filed.

Q. In other words, about February 1st? [592]

* * *

Q. (By Mr. Grodsky): By the way, you have testified that you have worked the take-off position and do you work it most often without gloves when you work it?

A. Most often, yes.

Q. And do you ever scratch your hands?

A. Might bang my knuckle now and then but as far as scratches are concerned, I don't remember any. [601]

Q. How often or how long do you work in the take-off position?

A. Well, that would depend as to whether or not the girl who formerly worked that station is absent.

(Testimony of Betty Cave.)

If she is absent, then, I work the station for a full eight hour shift.

Q. You have worked on it the full eight hour shift?

A. Yes. There was one time I worked it for a week and a half constantly.

Q. Now, you testified that at or shortly before the time that you observed that no solicitation rule posted that there had been a lot of dissension and that there appeared to be some agitation going on around the plant?

A. Throughout the plant, yes.

Q. Now, what in general was this agitation, is that what you were describing to us or are there some additional things that you have in mind when you describe agitation?

A. By that, one thing in particular was that Jimmie Juhl, who at that time was a mechanic, was free to go about the shop wherever his work took him and I would say four or five times a day he would come to the big conveyor to one of our girls, who was working there who had stated that she had signed a Mine Workers card, that he was after her to get her signature on the card. He would come several times throughout the day and approach her on this.

Q. Did you tell this to your leadlady or to your foreman? [602]

A. I had no reason to.

Q. Did it interfere with production in any way?

A. It did on that particular station, yes.

Q. But was your leadlady aware of this happen-

(Testimony of Betty Cave.)

ing? A. I assume so. It was quite obvious.

Q. Who was the girl in question?

A. Lora Rosa.

Q. Where is she now, do you know?

A. As nearly as I know, she is in Kansas. She has terminated with the company in June. [603]

KENNETH KING

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Macomber:

Q. Your name is Kenneth King?

A. Yes, sir.

Q. You are employed by the Essex Wire Corporation? A. That's right.

Q. As a foreman? A. At that time, yes.

Q. How long have you worked for Essex Wire?

A. Six years.

Q. How long have you been a foreman, or were you a foreman prior to the discharge of Ann, Loraine Evans? A. Prior to that?

Q. Yes. [627]

A. A year and a half, two years, maybe.

Q. Now, who was under your chain of command, that is, between you and Loraine, was there any assistant foreman?

A. Mr. Kresin is the department foreman and then——

(Testimony of Kenneth King.)

Q. Where does Mr. Gordon fit into the picture?

A. Mr. Gordon is in charge of inspection.

Q. And who is your immediate superior?

A. Mr. Harms, plant superintendent.

Q. What is your relationship with Mr. Simon?

A. Mr. Simon is the manager.

Q. Do you report to him occasionally, also?

A. Yes, sir.

Q. Now, how long had Loraine Evans been under your supervision?

A. Approximately one year.

Q. Will you tell me, I understand from the record that there isn't any question as to her general mechanical ability as an employee, that she performed satisfactorily within the mechanical sense, or am I wrong about that?

A. No, that is correct.

Q. Did you notice anything commencing with her employment in respect with relationship, with fellow employees in the matter of disputes, disagreements or anything of that kind?

A. Yes, I don't exactly recall whether they started exactly when she came to work when she was first hired. [628]

Q. Tell us when the matter of disputes was called to your attention?

A. I would say in the last, at least the last eight months of her employment.

Q. Would you describe the nature and extent of them as they came to your attention?

A. Seems as though she never could get along

(Testimony of Kenneth King.)

with anybody whoever you put back there with her. Around her, any area around her, nobody could get along with her.

Q. Who were the girls around her who seemed to be having difficulty?

A. One was Rita Frey. Helen Graesch. [629]

* * *

Q. (By Mr. Macomber): Now, do I understand that in addition to what you have personally observed and what you just described to us concerning the difficulties between these parties that there reached your attention reports of difficulties, disagreements from Mel Kresin and from others on other occasions? A. That's right.

Q. When did these reports first start filtering back to you?

A. Oh, for quite a while. I'd say at least six, seven months. It was going on and on.

Q. How frequent did you receive these reports?

A. Quite frequent. In fact, I had numerous sessions with Loraine. Several other people on their disagreements with each other, not being able to work with each other, at least three or four meetings, and the last two or three of the meetings that I had I gave each of them a thorough warning. It just went on and on and on and always causing a disturbance throughout the whole department.

Q. What effect, if any, did it appear to have upon the rest of the department? [635]

A. Well, it created an awful lot of uneasiness which certainly isn't very good for production or the

(Testimony of Kenneth King.)

rest of the people. It took a lot of peoples' time, spent a lot of time. I feel as though they had plenty of warning. Mr. Gordon had several talks with them.

Q. Gordon had several talks with them, you say?

A. Yes. I'm quite sure that Mr. Kresin also had several sessions with them and, like I say, I have had three or four, possibly five that in every case Loraine was considered. She was in every one of them and in many cases there was this continuance bickering back and forth and names being called back and forth and such things as that.

I mean there was no agreement between either side. Neither one of them could agree on what they said. [636]

* * *

Q. Now, Ann Hamilton—strike that.

Did you observe shortly after the first of the year and after the emergence of the conflict between these unions that the girls broke out in a rash of these union buttons, both unions, took to wearing these buttons?

A. Yes, there was some outburst there, you might say.

Q. Did you ever advise or say to Ann Hamilton or anybody else they could not wear a union button?

A. I actually did not tell anyone not to wear a button.

Q. Tell me this, how did this campaigning or union conflict first manifest itself, in what general way, tell us briefly.

A. I don't—

(Testimony of Kenneth King.)

Q. How did it first come to your attention, what things came to pass there in the plant, what did people do, what did they say that made it known to you that here was starting some sort of a campaign between rival unions for dominance or that the employees were beginning to feel a conflict and beginning to [637] take sides?

Do I make myself clear now?

A. Well, I will try to explain.

Q. Fine.

A. There was quite a bit of uneasiness throughout the plant, not only in the harness division but others. The one big thing I think that upset most of the people, I might be wrong, but I think one of the big items is the fact that the people, not the IAM union, were wearing these other pins and that caused quite a bit of friction throughout the plant especially where I spent most of my time. But that led from one thing to the other. I mean there was bickering going on and discussions and——

Q. Sticking to the buttons for the time being, when you noticed these buttons were causing trouble, did you go and speak to Mr. Simon about the buttons?

A. Yes, I did.

Q. Did you ask him whether it was all right for the girls to wear the buttons?

A. Mr. Simon makes a routine walk through the plant and that morning while we were talking, I asked him if these pins were all right to wear.

He told me that he didn't think they were and after a little more conversation, he said he would check into it.

(Testimony of Kenneth King.)

Q. He said he would check into it? [638]

A. That's right. So at that point, so it must have been 15 minutes later or so, I was talking to Ann Hamilton and it wasn't very long later, I don't recall exactly how long it was, maybe, oh, two or three hours, something like that, later, Mr. Simon came out and told me that it was legal for them to wear those pins, that there was not to be any campaigning such as passing the pins back and forth or literature or something of that type but so far as wearing the pins, they were entitled to wear the pins as much as anyone else. This was after I talked to Ann Hamilton.

Q. After you talked to Ann Hamilton?

A. Yes.

Q. When you talked to Ann Hamilton the first time, do you recollect whether there was any discussion before about pins—when I say “before,” you did talk to Ann Hamilton before Mr. Simon came back and advised that it was perfectly legal to wear pins, is that right? A. Yes, sir.

Q. In the meantime you had a conversation with Ann, is that right? A. Yes, sir.

Q. What, if anything, was said about the pins in that conversation, if you can recollect?

A. There was nothing exactly said about removing the pin. As I was talking to her about this no campaigning thing, more [639] or less, I mean it was a matter of discussion, as I was talking to her there, I must have been talking, maybe, four and a half minutes, she removed the pin, slowly removed the pin.

(Testimony of Kenneth King.)

Q. How did you happen to talk to her about no campaigning? A. Pardon?

Q. How did you happen to talk to her about no campaigning?

A. Well, at that time this Freda Totedo, I guess her name is, she was on the switch light line right in back of her and there was a lot of discussion going around the plant that people were wearing the pins and they wanted to know what was going to be done about it and so on and so forth.

And this Freda and a couple other people, so on and so forth, asked me to see what I could do about it. So I talked to Ann Hamilton about it, although I did not tell her to remove her pin.

Trial Examiner: Can you remember the conversation, what you said or the substance of what you said?

The Witness: Not exactly.

Trial Examiner: Well, we know that you told, did not tell her to remove the pin but I'd like to know what you did say, if you recall.

Q. (By Mr. Macomber): Yes, just tell us, we don't expect you through the haze of time to repeat word for word. That would be almost impossible to tell everything that was said, but we do want to know as nearly as accurately as possible what [640] the conversation was, what she said and what you said, in substance. A. Well——

Q. The way to do that is go back in your imagination and take another run at the thing. You are

(Testimony of Kenneth King.)

walking up to her. She's standing there. Try to remember what you said to her and what she said to you as best you can recall. That is the best you can do.

A. Well, I was, I went to her and told her that all this problem, all these discussions and problems we had been having probably could be eliminated in most ways if people would stop their bickering back and forth. I mean there was more or less of a gang affair, you might say, one side versus the other.

Naturally, either one of them could get along with each other. I told her that she wasn't permitted to pass back and forth the pins, so on and so forth, not that she was passing the pins back and forth, just as I reminded to her that there was to be no pin passing back and forth, as I was talking to her, she was just leaning over the machine there. As I was talking to her, she removed the pin. She just held it in her hand there, with other people watching us because I know they were all concerned about what was going to happen.

There was just, I don't recall whether I ended the subject right there or whether I was called away or **what.**

Q. Did she say anything to you?

A. Well, she asked me why, and I just told her why. [541]

Trial Examiner: Why what?

Q. (By Mr. Macomber): Why what, she asked you why what?

Mr. Macomber: Is that what you were going to

(Testimony of Kenneth King.)

ask? She asked you why, what did she ask you why about?

The Witness: She just asked me why I had come to her in particular than anybody else.

Q. (By Mr. Macomber): What did you say when she said why have you come to me in particular?

A. I told her no particular reason why I had come to her but I had to start with somebody. There was no particular reason for me seeing her.

Q. Particularly after you talked to Mr. Simon, did you ever tell anybody to remove their button or their badge? A. No, sir.

Q. When was it that you had this conversation with Ann Hamilton, as best you recollect it, keeping in mind that she was discharged on the 10th of February, not discharged, but she terminated, or whatever happened to her, happened on the 10th of February, 1954?

A. The best I can remember it must have been just before the bulletin came out about this pin wearing.

Q. Was it pin wearing or solicitation?

A. Solicitation.

Q. Would that have been, when you refer to a bulletin, do you refer to—— [642]

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Macomber): Take a look at this,

(Testimony of Kenneth King.)

General Counsel's No. 2, look at it, examine it, read its contents. Is that the bulletin to which you had reference in your last answer?

A. That is correct.

Mr. Macomber: You may cross-examine.

Cross-Examination

By Mr. Grodsky:

Q. Mr. King, with relation to the day on which Ann Hamilton was terminated from the plant, could you relate back about how long before that you had the discussion with her about the button?

A. I don't recall it exactly. I really can't remember.

Q. I see. Did you see when that bulletin that was shown to you, General Counsel's 2, did you see when that was posted?

A. I didn't see it actually posted, no, but I saw it the same day it was posted. In fact, right after it was posted.

Q. I mean you saw it on the bulletin board?

A. Oh, yes, sir, I saw it on the bulletin board.

Q. And your recollection is that you spoke with Ann before you saw that on the bulletin board?

A. Yes, sir.

Q. Now, when you spoke to her, you told her that, or did you tell her that there was a rule about no campaigning? [643]

A. No.

Q. Well, what did you tell her?

A. I didn't come right out and tell her that

(Testimony of Kenneth King.)

there was a rule about no campaigning. There had been discussion about handing things back and forth and literature. So I was just explaining to her that anyway, she should not do any of that type of thing.

Trial Examiner: Discussion on whose part did you refer to?

The Witness: I don't follow what you mean.

Trial Examiner: You said that part of your statement to Mrs. Hamilton was that there had been discussion about the handing back and forth of buttons and distribution of literature.

The Witness: There had been discussion with myself and Mr. Simon, management, so on and so forth, like that.

Trial Examiner: Who is so on and so forth?

The Witness: Mr. Simon and management, Mr. Harms, Mr. Simon.

Trial Examiner: It's just management, then, no so on and so forth?

The Witness: That's right. There was no set rule at that time but I did go to her and ask her not to contribute to any of that. Later on was the bulletin that came out and stated there was to be no campaigning.

Q. (By Mr. Grodsky): Did you speak to her on the first day that you observed buttons, Mine Worker buttons in the plant? [644]

A. No, there had been other buttons prior to that.

Q. That is other Mine Workers' buttons?

A. I am quite sure. I don't recall whether they

(Testimony of Kenneth King.)

were in the harness department but there were other buttons being shown.

Q. Did you talk to anyone else the same day you talked to Ann about cautioning them about engaging in union activity? A. No, sir, I didn't.

Q. Did you talk to anyone else if not on that day, on some other day? A. No, sir.

Q. In order that the record should be crystal clear, the only person you spoke to about the subject was Ann?

A. The only person I spoke to about campaigning was Ann Hamilton.

A. Now, you mentioned that Freda and others had spoken to you. Had they spoken to you before the time that you spoke to Ann Hamilton?

A. Yes, sir.

Q. And who were these others?

A. One in particular was this Freda Totodo, I guess you pronounce her name that way, and the other ones, I really can't remember who they were.

Q. About how many of them were?

A. Oh, I imagine, in the form of a discussion.

Q. Was it in the form of a delegation? [645]

A. No, no, just a casual—was no planned meeting of any kind or anything like that.

Q. Well, did a couple of employees come and talk to you?

A. No, sir, I was walking through the switch line.

Q. Yes.

(Testimony of Kenneth King.)

A. Around that area, through there, and there's where it started.

Q. And Freda spoke to you?

A. Yes, she mentioned it to me.

Q. What did she say to you?

A. She just said that this girl was wearing this pin.

Trial Examiner: Which girl wearing which pin?

The Witness: Ann Hamilton wearing this pin and had gone into the rest room without the pin and came out of the rest room with the pin and it was causing a lot of disturbance and they wanted to know what I could do about it.

Trial Examiner: Then Mrs. Totedo identified this pin or spoke of it as "this pin"?

The Witness: I don't hardly remember. She said just "one of those pins." I took it for granted that is what it was.

Trial Examiner: Very well.

The Witness: But I did see the pin.

Trial Examiner: I know you ultimately did. I was wondering whether when Mrs. Totedo first mentioned it whether she had described it or identified it. [646]

The Witness: No, sir, I'm quite sure, just spoke of it as a pin.

Q. (By Mr. Grodsky): Did any other employees before you spoke to Ann talk to you about it in addition to Freda?

A. Yes, there were one or two others. Now, I

(Testimony of Kenneth King.)

don't recall their names. I really don't remember it.

Q. That's right.

A. I just remember this one in particular.

Q. Now, when you went to Ann, did you make any inquiry into the subject that Freda was interested in, namely, about her not wearing a pin when she went into the rest room and wearing it when she came out?

A. No, sir, I have not made an issue of that whatsoever.

Q. You didn't talk to her about the pin at all, or did you? I think you mentioned that you mentioned something about passing pins.

A. I mentioned to her about passing pins, yes.

Q. Just what was it that you said to her about solicitation and about union activity?

A. I just don't remember exactly. I had a talk with her that just meant that we didn't want any disturbance going on throughout the plant and that several people were complaining about it and that whatever we could do to limit it would be just that much more help.

Q. In these complaints that you heard about that from Totodo [647] and these other employees, is that what you had reference to when you testified earlier that their campaigning was causing trouble?

A. Would you repeat that, please?

Q. You said at one time in your direct testimony that the campaigning of the Mine Workers group was causing trouble. Do you remember that you said that?

A. If I said it, why——

(Testimony of Kenneth King.)

Q. If you didn't say it, let me ask you now: Apart from this on again off again button incident, was there any other campaigning problem that was called to your attention at the time or before the time that you spoke to Ann Hamilton?

A. No, there was no other problem.

Trial Examiner: Your answer is what?

The Witness: No.

Q. (By Mr. Grodsky): Now, turning to the problem of Loraine Evans' discharge, you said that you were aware of trouble for at least the last eight months of her employment, is that correct?

A. That is correct.

Q. And her immediate foreman was Gordon, wasn't he?

A. Mr. Gordon is in charge of inspection. He instructs them in the method of inspection, what goes, what doesn't go, but their conduct and so on and so forth are under the supervision of production which in this case was myself. [648]

Q. In other words, between you and Loraine, there isn't an intermediate foreman, is that a fair statement?

A. Well, what I'm getting at, Mr. Kresin is the department foreman actually.

Q. He is the department foreman of the department which includes the checking, the checking process?

A. He, no—let me make that clear.

Q. Yes, please do.

A. Mr. Gordon is in charge of inspection. He

(Testimony of Kenneth King.)

instructs the girls on the inspection line there, the method of inspecting, what to look for, what not to look for, what goes and what doesn't go.

So far as their conduct in that department, their work or anything to do with the production department, that comes right under production. I mean, Mr. Gordon had no authority over them so far as absenteeism or mechanical ability. He just instructed them on inspection work.

Q. If a girl in that department had to go to a nurse, who did she ask to go to the nurse, if you know? A. Repeat that, please?

Mr. Grodsky: Would you read it back, please?

Trial Examiner: Will the reporter read the question, please?

(The question was read.)

The Witness: Actually, there was no set rule on that. [649] Mr. Gordon worked over on the other end of the plant quite a ways away. We had a relief setup there for the girls which, if they needed relief, they didn't even have to contact any foreman. Just see the relief girl, she would take their place and that was it.

Q. (By Mr. Grodsky): Now, we have had testimony here that in order for the girl to go to the nurse, she had to have a pass that was issued by the foreman? A. I misunderstood. I'm sorry.

Q. Now, I will repeat my question. To what foreman would a girl working as a checker to what

(Testimony of Kenneth King.)

foreman would she look to for a pass to go to the nurse, if you know?

A. Didn't I say there was no set rule on that? To tell you the truth, I never had that occasion come up. There's never been any problem on it. I really can't say whether they went to Mr. Kresin or Mr. Gordon. I would think they went to Mr. Kresin.

Trial Examiner: Mr. King, if I interpret the general purpose of Mr. Grodsky's examination correctly, his question as to what supervisor a girl would look to for permission to go to see the nurse is brought into the hearing only by way of illustration to illuminate a broader problem.

What I think is important here, unless Mr. Grodsky has a purpose which is not now apparent to me, is a determination as to the precise nature of the supervision over the checkers. [650] Now, you have indicated that Mr. Gordon was in effect their instructor and observer or supervisor insofar as the actual conduct of the checking operation was concerned but that there may have been some other supervisor with responsibility extending to the checking area and to the checkers between the girls and yourself.

Now, if that is the fact, if there was some supervisor with some kind of authority over this area of the plant other than yourself and other than Mr. Gordon, who would that have been?

The Witness: Mr. Kresin.

Trial Examiner: Mr. Kresin's authority as fore-

(Testimony of Kenneth King.)

man extended to that area of the plant, the checking area in these particular respects that you have outlined?

The Witness: Oh, yes, covers the entire department.

Trial Examiner: I think at this point that it would be well to break for a five-minute recess.

(Short recess taken.)

Trial Examiner: The hearing will be in order.

Q. (By Mr. Grodsky): Now, you testified that where Loraine Evans was they weren't able to get along with anyone back there. That, I believe, was substantially what you said, is that right?

A. That is correct.

Q. And you mentioned some, you named Rita Frey and Helen [651] Graesch.

Now, in connection with Rita Frey and Helen Graesch, what happened, were they transferred away from that station?

A. Yes, we had considerable amount of problems there so we tried to iron out the problem so we moved these people in question away from that particular area. In fact, in some cases moved them out of that section of the department, moved them to the other side in the press section, and then the problem seemed to die down there for a while and then reoccur or someone else or some other problem would come up.

Q. At the time you moved them away from that area did you have them in the office, did you discuss

(Testimony of Kenneth King.)

the problem, did you investigate, did you investigate what the situation was?

A. Yes, I had people in question in the office with Loraine.

Q. You had Rita and Helen and Loraine in the office? A. Yes.

Q. Was any other supervisor there in the office with you? A. At times, at times there was.

Q. Were these three in the office together with you on more than one occasion?

A. Definitely.

Q. Now, can you place the first occasion when they were in the office with you?

A. I don't exactly remember the first occasion.

Q. Well, is it a fact the first meeting you had with those [652] three was prompted by Loraine coming into your office and asking for a transfer?

A. No, sir.

Q. Do you remember a time when Loraine came in and asked for a transfer?

A. I believe there was one occasion for that.

Q. And that was a time that involved these two girls?

A. I'm not quite sure but it probably was.

Q. At that time did you call the two other girls into the office? A. No, sir.

Q. Do you remember why Loraine wanted a transfer?

A. If I remember correctly, she wanted a transfer because of not being able to get along with the people in that area. I think she felt that she was

(Testimony of Kenneth King.)

being picked on more or less and she requested a transfer.

Q. Eventually you transferred the other girls, is that what you did?

A. We transferred the other girls. Now, whether it was at this time when Loraine was requesting the transfer or before or after, I don't remember but we did transfer the other girls.

Q. And was there any operational reason why you didn't transfer Loraine?

A. There was one thing why we didn't transfer Loraine. It was discussed between myself, Mr. Gordon that Loraine was [653] very good on inspection, that between the three we felt that we would leave Loraine there and remove the other two.

Q. Now, then, at any other time after you transferred those two other girls—strike that.

Do you remember a girl by the name of Holst?

A. Vina Holst.

Q. Vina Holst? A. Yes.

Q. And there was a time when friction developed between Vina Holst and Loraine, wasn't there?

A. Yes, sir, yes, there was.

Q. And on this occasion you transferred Vina Holst, is that right? Or let me ask you, did you have anything to do with the transfer of Vina Holst?

A. If I recollect correctly I didn't, I don't think she was transferred.

Q. Well——

(Testimony of Kenneth King.)

A. You mean, what do you mean by transfer, from one department to the other?

Q. Maybe she wasn't transferred in that sense. As I recall, Mr. Gordon's testimony was her work station was moved.

A. That's right.

Q. That is what happened and you had nothing to do with that?

A. No, sir, it was discussed with me, but to make the actual move, Gordon made the move. They were working together, [654] Loraine and Vina Holst at this one section.

Q. We already have testimony about that. You didn't observe any friction between them, did you, personally observe any friction?

A. Vina was, had two conversations with me about it.

Q. All right. Now, what did she say to you about it on both of these conversations?

A. Well, in both occasions she suggested that she would like to be moved down to the further end of the conveyor.

Q. And did she say why?

A. Because she couldn't get along with Loraine.

Q. Did she say in what regard she couldn't get along with Loraine?

A. I'm sure that she said something about some personal problems that she was having but I really don't remember the full conversation.

Q. Now, in addition to those three girls whose transfers we have discussed moving away from that

(Testimony of Kenneth King.)

station, do you know of any other girls who have come to you with problems about Loraine?

A. About Loraine?

Q. Yes.

A. Only in one sense, that the entire group of people were complaining about the friction down there that it was disturbing their work. Other than the people called out [655] here, there has been no, there's been no one else to actually come in and have a talk with me about a transfer.

Q. Did Dorothea Randall ever complain to you about Loraine? A. Dorothea Randall?

Q. Yes. That's right.

A. There was at least one, maybe twice that she was complaining to me about Loraine. [656]

* * *

MITCHELL J. SIMON

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Macomber:

Q. Mr. Simon, in what form or manner did the matter of the termination of Ann Hamilton first come to your attention, what reports did you receive and from whom?

A. Well, as is the rule around break time, everybody begins to stir, I included. Fred Harms and

(Testimony of Mitchell J. Simon.)

I had been out around walking, I usually make a round around the plant with Fred in the morning and just about break time. Fred and I were walking toward the harness department and at break time everybody started to move toward the coffee room so we stepped over in one of the doorways in the wall, stepped back and stood there and talked for a few minutes, and then proceeded on to the harness department.

I believe we looked around, we were looking at one of our good neighbors here in San Diego who has some stuff stored at our plant and we were thinking about the rearrangement of the [681] plant. We were talking about this stock of his, general plant discussion, and I think it was either at the end of the break time or shortly thereafter, we walked up and we were going to discuss with King this plot of rearrangement of the harness department.

And the discussion was going on between King and Kresin regarding Ann Hamilton and we stood there and listened to it, listened to the story and I asked a couple questions regarding the girl.

Q. Of who?

A. King and Kresin, both. And I asked Mel, particularly, what had happened to the girl and if she was hurt. He said, no, she was just crying and she wanted to go home. He said she wasn't feeling good and I said, "Why?"

And he said, "She didn't say why."

And I said, "What did the nurse say about it?"

(Testimony of Mitchell J. Simon.)

The story is precisely as given in the testimony which has been repeated so many times.

And I said, "Well, was she hurt, did she get hurt?"

He said, "No, not that I know of. She didn't say she was hurt. She just told me, 'What is bothering me a nurse can't help.'"

I said to him, "Did you tell her she had to have a pass from the nurse to go home?"

He said, "Yes." [682]

And I said to Mel, "You are telling me now that the nurse told you that she walked up there and asked for Mrs. Barnes?"

And the nurse told her, Mel told me that when he asked the nurse if Ann Hamilton had been up there to see her, the nurse said, "Yes, she came up here and asked for Mrs. Barnes and I told Ann that Mrs. Barnes is at a funeral representing the company. One of our employees or one of their family passed away."

And she said, "With that, she turned around and walked out."

That is the story that Mel is telling me and I said, "Well, did she come back to you?"

And he said, "Yes, she came back here and she told me that she wasn't feeling good." And he said, "She had tears in her eyes."

And I asked him if he tried to find out what was wrong with her and he said, "All she would tell me is what is wrong with her the nurse couldn't help, and I told her she'd have to get a pass from

(Testimony of Mitchell J. Simon.)

the nurse stating she was ill because I needed her on the conveyor and I was short and I didn't want to see her go home."

With that, I says, "O. K." to Kenny and Mel and I said, "Fred and I will discuss the situation and we'll handle it from here."

So I told Fred that, consistent with company rule and [683] policy that any employee who refused to accept an assignment given them, any particular job that we transfer them within the classification which is our privilege which we do every day, it's common practice, any of those people who refuse the assignment, we consider them voluntary quits. Any person that leaves the premises without proper authorization is an automatic quit.

We have had many such cases here at San Diego and other divisions where I have been.

Q. How frequent are those instances?

A. Oh, I'd say, occasionally, maybe, we have had four or five down here. I suppose I could dig them out if I made an extensive attempt.

Q. People walk off the job without any kind of a slip?

A. Just decide they are going home and just leave and any case such as that, we just pull the cards and we say it is a voluntary quit and is even protested on that basis at the unemployment compensation commission. When they apply for compensation, we make a protest that they left their work voluntarily without authorization and we considered that an automatic quit.

(Testimony of Mitchell J. Simon.)

So that is the way the thing came up to me and that is the way it was disposed of.

My instructions were to Harms to pull her card and tell Mrs. Barnes to have the girl go back and see the foreman, see [684] him. Since I'm on the road most of the time, Fred Harms closes out most of the deals.

Had—well, maybe that isn't the question, but I was just going to elaborate. Had this young lady mentioned one word of not being able to do the job, we have a rule, of course, wherever a girl wants a permanent transfer that she says, "I can't do this work for such and such a case," we have her make a written statement why she can't do it and so on and send her to our doctor for examination.

But if a girl such as Ann who unassumingly does her work every day and came to a foreman and said to a foreman, "Well, such and such is bothering me and I'd like to get relief," or, "I had a bad night last night, my kids kept me up all night." I just can't do that job today, can I get off it today?"

In that case, it's been a practice for us to take them off. Any foreman we have here at San Diego will testify to any such statement.

We do not allow our foremen to abuse any of the employees. Just in recent months we have discharged two such supervisors.

Say, one fellow that came to us that was just not speaking properly with the girls, not handling them conducive to our program. We neither had a grievance nor a complaint from the union nor a

(Testimony of Mitchell J. Simon.)

complaint from the people. We heard via routine as we usually do that such and such was the case and we questioned the man. I questioned his foreman, Kenny [685] King was his foreman. Kenny King said, "I have reason to believe that is the case."

Fred and I got the man aside and questioned him and said, "Now, look. We want the absolute truth."

The man said, "Well, maybe—" I mean, you can tell by his attitude that he on occasions had done it.

We let the matter go until I got up to the financial department. I had his money prepared and the next time I was in San Diego I turned the checks off and said to Fred, "Pay this man off."

It was the end of him and that is the policy by which we work and I'm sure if this girl, Ann Hamilton, in this particular case would have made any attempt whatsoever to state her problem, if she had any, she could have and would have been held.

Nevertheless, we can't allow one person to get away with breaking the company rules and policy and another one not. It's just not good business.

Now, that is the extent of what I know of the Ann Hamilton case from beginning to end.

Q. Did you have any personal contact with her beforehand, with Ann Hamilton? A. No, sir.

Q. You never had a chance to discuss buttons, the wearing of buttons or campaigning or union activity? [686]

A. The only thing I knew of Ann Hamilton was

(Testimony of Mitchell J. Simon.)

that she was the wife of J. C. Hamilton, a sister-in-law of Loraine Evans.

Q. Did you know at that time, that is, the time of discharge, that she was a member of the United Mine Workers?

You shake your head, you mean——

A. I don't know whether I can state myself when I shake my head. The significance of them being members of one union or another meant nothing to me at all. I mean, it doesn't matter which union a person has representing them. They are still the same people. No matter, you actually deal with the same people.

I have been with the organization almost 20 years. I have dealt with maybe six or seven or eight, I don't know, I can't tell you the various types of unions.

My first experience down here was with the Machinists.

I also have charge of the Anaheim plant. I got the Teamsters. How a Teamsters Union represents a wire plant is kind of strange but that is the case. They are the Teamsters, Chauffeurs and Warehousemen.

I have at one plant an Independent that belonged to what they call the National Electrical Wire Workers of America Associated, and they were associated with a bunch of other Independents.

I had UE, CIO, both factions of the CIO, the UAW, CIO, the IBEW, and that is why the fact that these people were [687] looking toward the

(Testimony of Mitchell J. Simon.)

Mine Workers for guidance or whatever they wanted was of no significance whatsoever as far as the local management is concerned.

Q. Now, skipping over on to the case of Loraine Evans, did you have any personal knowledge of her activity prior to her discharge?

A. Oh, yes. She stated to me one day as I was walking through the plant——

Q. Give us, Mr. Simon, the approximate date. If you can't give the approximate date, some date with relation to, say, the bulletin, the 15th of January.

A. Somewhere, I would say, it would be given or take, a week or two, a week or two after the bulletin. Loraine related to me that she was the chairman, she had been selected chairman of the United Mine Workers and that the—oh, it came about, I'm trying to think now how it came about that she told me. It was right in the aisle behind my office out in the factory.

Well, anyway, I can't remember how it came about, but she told me that she was selected chairman or chosen chairman of the United Mine Workers and I told her that was one thing the company didn't participate in whatsoever, factional dispute. We knew there was bickering going on. She admitted there was bickering going on.

It was causing us to have difficulties and harmonious relations which we have had prior to that period. as the [688] fact of the matter is, we

(Testimony of Mitchell J. Simon.)

operated almost four years without a written grievance. I think that is a pretty good human and labor relations record.

I think the record always will speak for itself of how you treated your people, how they treated you, you liked them and they liked you.

And I tried to explain when Loraine informed me of her chairmanship of this relation, how we felt about people and what they thought, and I told her that the company never enters into the factional dispute. And I recall in her testimony yesterday she said that I told her whenever the people decided they wanted a union in San Diego I went out and got the IAM for them. I think she is a little mistaken. I said that day that in my early days in the factory when I was an hourly rated employee, I participated as an hourly rated employee in organizing one of the first unions in the Essex Corporation. Maybe that is the mistake she made.

But I told her I understood her problem. The only thing I asked of them was that they, their thoughts and cares about who they wanted, what they did and so on be carried on outside of working hours, that I don't want to become involved in it, none of my staff members want to become involved in it. We don't care if they organize the people and they are designated the bargaining agent. We still had to bargain with the same people, still the same employees. [689]

Q. Let me ask this question, Mr. Simon, did you ever have any firsthand contact with any of the

(Testimony of Mitchell J. Simon.)

difficulties, if there were any such difficulties that Loraine Hamilton had—Loraine Evans had with fellow employees? In other words, did you personally observe any disputes or dissensions?

A. Well, personally observing, no.

Q. Did you receive any reports? A. Yes.

Q. From your immediate subordinates whose duty it was to supervise activity?

A. Yes, and also from Loraine herself.

Q. Tell me about what conversations, if any, you had with Loraine respecting these different disputes. Tell us first when you had these discussions, who was present and where the discussions were held.

A. The first time that I could recall coming in contact with Loraine regarding disputes was when she worked for Scott Dunlap who was then in charge of the inspection before Alex Gordon.

Scotty had told me about Loraine and how he had put her on this job. She picked it up fairly well but he was having trouble down there. There seemed to be disharmony.

So I went down. I recall the conversation and at that time there was Loraine Evans and Rita Frey as I can recollect. And Rita Frey used to alternate with work between Loraine [690] Evans on the line, then do some small jobs, then walk over to the other side on miscellaneous and then come back and so on.

Well, I talked to her then and asked her how she liked the job.

(Testimony of Mitchell J. Simon.)

Fine. Was she having trouble? She said, "No, but I don't think the girl I'm working with likes me very much." Something in that nature.

And I can't recall the conversation except that what I usually tell people is that, well, we all have different personalities and all not tuned to like one another and let's just sort of ignore personalities and stick with our jobs and so on because that is any normal approach.

Q. Let me ask you this question, did you immediately participate in the determination which related to the discharge of Loraine Evans or was that something that you heard about afterwards through your subordinates?

A. King discharged her.

Q. As I understand it King discharged her after some discussion with Mel. Did he take that up with you before he discharged her or was that something done on his own authority?

A. No, the first I knew of Loraine's discharge, I was just walking out of my office in the same aisle behind there. I told you about how Loraine came up the aisle and said, "Mr. Simon, I have just been fired." [691]

Q. Tell us about that.

A. And I said, "What do you mean, you have just been fired?"

And she said, "Well, Kenny just fired me."

And about two steps behind her was Betty Cave.

I said, "Look, Loraine, we have had lots of discussions about various things. You are always com-

(Testimony of Mitchell J. Simon.)

ing to me with one problem or another. You have a union, you have a union grievance, union procedure. I think you ought to write it down, get it in writing and let's not sit here and talk generalities and then later on everybody standing there, I mean, and saying, 'Well, I didn't say this and I didn't say that,' your committeewoman can write that down."

I said, "Talk to her about it and go through the proper channels."

That is the last discussion I had with Loraine Evans after her discharge until——

Q. Do you recall when J. C. Hamilton testified he referred to some incident involving Goldie and to a conversation which you were supposed to have had with him, that is, with J. C. Hamilton, in which you said that if June—this involved the slapping, the so-called slapping incident—if June gets a witness to corroborate her, you'd have to fire him, something to that effect, do you recall that conversation?

A. I do. J. C. Hamilton and Goldie Riggins who is the day committeewoman and, I guess, who represents this gal on that [692] side of the building, Goldie and J. C. were up in J. C.'s foreman's office and they got a hold of me and Goldie said something about June told her that J. C. intimidated her by saying he was going to slap her.

And I said, "Is that so, J. C.?"

And he denied it. He said, "That isn't so," and he proceeded to tell the story. I can't remember what it is even though I heard it day before yester-

(Testimony of Mitchell J. Simon.)

day, but when he was telling it, it is pretty much the same way as he told me then.

And I said, "J. C., you know that is a serious offense to begin with, a man hitting a woman. Secondly, I don't know what you are up to whether you said it or not." But I said, "If these people file a grievance against you and they have witnesses that were standing there and heard it and swear that they heard it, then there wouldn't be any recourse for me but I have to discharge you on the basis of your threatening this woman on company time and property."

He said, "Mr. Simon, it just isn't so."

I said, "J. C., you don't have this thing to worry about if it isn't so. Nobody is going to file a grievance and nobody is going to swear to it."

And that is the last I heard of it. So, evidently, it must have been untrue.

Q. He said also that he had a discussion with you regarding the buttons? [693] A. No, sir.

Q. Well, he said that Simon said, "Take that badge off and leave it off."

A. No, that is incorrect. I can quote this discussion practically verbatim because it made me awfully angry.

Q. Just tell me this, you didn't have any such discussion with him relating to the badge?

A. I never mentioned the button at all to J. C. Hamilton or Ann Hamilton or to Loraine Evans.

Q. You never told anybody to remove their union button?

(Testimony of Mitchell J. Simon.)

A. Absolutely no. The only discussion is that I told in my testimony the other day regarding Jerry Pipmeier when he walked from Vivian Moore and was putting his button on his shirt. I told him that he could not campaign on company time and this was during working hours and that he could not take that button and pass it around to various people.

He said, "Mr. Simon, I have had no trouble here and I have liked it working here," and he said, "I'm not looking for any trouble."

With that, it was the end of the conversation.

Q. This J. C. referred to an incident in the coffee room where he also says you told him to take that badge off and he said, "Well, if others can wear the badge, I can wear a badge."

That doesn't ring a bell, you had no such conversation? [694]

A. That is, that is a very incorrect statement.

Q. He said you also told them that if you didn't, if he didn't like it you could close the plant up and move to Anaheim, or words to that effect?

A. That is a nonsensical statement because we couldn't move any of San Diego's equipment to Anaheim because they don't have any harness making equipment. Besides we have no room.

Q. Do you deny making such a statement?

A. Absolutely. There was a conversation.

Q. About what?

A. (No response.)

(Testimony of Mitchell J. Simon.)

Q. About the badge?

A. No, sir. That is the conversation that he mentioned about the telephone and the lavatory. It was after rest period as he stated when I saw J. C. He was not coming out of the lavatory, he was coming out of the phone booth.

I saw him when he went in and I said, "J. C., look, you know the situation that exists here today. Now, I have asked you before to behave. Get over on your job and stay there."

He got belligerent and said, "When I have to go to the lavatory, I got to go, and you and nobody like you is going to stop me."

And I said, "Look, that phone booth is not a lavatory. You just got done with your rest period. You were in the [695] lavatory after the rest period only five minutes after the rest period. You came out and the phone was ringing and you answered the phone and it was a telephone call to you."

This is a pay station phone in the plant where they are not supposed to receive phone calls.

And I said, "That phone call, as far as I'm concerned, is a pre-planned deal because you could never have incidentally come out of the lavatory, pass by the phone at this particular time and it should be ringing where we have over 300 employees and the phone call just happened to be for you."

And that is where he made the statement, he made the statement about how I was mistreating him because he was wearing a button and he was going to

(Testimony of Mitchell J. Simon.)

go to the Labor Board and close me up and all kinds of nonsense.

And I said, "Look, young man, I don't care what kind of a button you are wearing. There isn't anybody around here going to threaten me. Get back to the job and stay there and if I catch you off there, I'm going to fire you."

That is the statement right to a "T."

Q. Loraine Evans testified and Betty Cave again this morning referred in her testimony to some petitions which were described in the record and which I now hold in my hand. Counsel for the Board described the petitions and we, by stipulation, put them in the record. But just for illustrative purposes, I will hold those petitions up so you will know what I'm talking about. [696]

Directing your attention to those petitions, can you tell us how they first came, how and when they first came to your attention?

Those petitions came to my attention, there were four girls that walked through the aisle to which I referred to before to the back door of the general offices of which my office door faces.

Q. Before that did you have any knowledge of that so-called petition?

A. No, never saw it.

Q. As a matter of fact, that was what we have been calling a petition is just some paper with a lot of names that we understand wanted an interview with Mr. Simon, is that right?

A. Yes.

(Testimony of Mitchell J. Simon.)

Q. And when they came into the office, who led the delegation or who carried the petitions?

A. I think, well, I don't know who carried it. There were four girls as I testified and I can't think for the life of me who the other one was. One was Freda Totedo, one was Melen McLewin. Now, I have, there's two of them.

Trial Examiner: Do you remember about when this was? I don't think the date was shown.

Q. (By Mr. Macomber): Do you remember whether it was before or after Ann departed, these petitions, do you recall whether it was before or after posting of the bulletin, does that [697] give you an anchor?

A. I can't, I just can't put my finger on it.

Q. Was it early in the year?

A. I think perhaps it was in January. I couldn't swear to that, counsel.

Q. All right, go ahead and tell it.

A. Whoever the four were, anyway, I named three of them the other day. They walked into the office with this petition and said, Mr. Simon, and put these on my desk, these papers, and said, "All these people, we have worked here for a long time. We have never had any trouble. Things are so upset out in the plant. There's a lot of this union talk going on and the company will close the plant down and all such nonsense as that. Can't you do something about it or what can we do about it?"

I said, "Now, look, girls. First of all, you know this is the wrong approach. Number one, you

(Testimony of Mitchell J. Simon.)

shouldn't be circulating papers in the plant. Number two, you have the designated bargaining agent here, union representation. It's not my place to advise you what to do. If you have troubles, you have bad working conditions, then the place for you to get your information is down at your union hall. This factional dispute that is being carried on out here is something that management cannot participate in. We have no hand in the matter at all. No matter, even if we lean one way or the [698] other, it doesn't matter which way we lean, the other side will say we are unfair to them. Consequently, we got to walk down the middle and be careful where we step or we might step on somebody's toes. Now, I can't do anything for you. This is something time must heal."

And with that, the girls said, "Thank you," and walked out. That is it.

Q. You kept these so-called petitions in your file?

A. Yes, sir, like I kept a lot of that other detail stuff.

Q. Do you know of any other petitions being circulated in the plant?

A. No. I know from time to time somebody passes a little box around, unknowing or unapproved, collection for somebody that has had a hard time or something of that nature, but we definitely, and the people know that if they want to circulate anything within a department or the plant or so on, they must get the approval of the management to do it. That is the agreement we have.

(Testimony of Mitchell J. Simon.)

Q. That goes for the very petition that has been described in the evidence?

A. The very petition comes under that rule.

Q. Do you know anything about the circulation of the T.V. petition in there, was there such a petition?

A. I didn't even know this Freda liked polkas.

Q. One of the witnesses for the Government testified that [699] somebody apparently connected with the—I can't keep these initials straight—with the IAM, one of the representatives of the IAM on company time came into the plant and engaged in some activity which was vaguely described as campaign activity, as I recall.

Are you aware of specifically giving any such union representative authority to go in there and campaign or did any such person go in there and campaign to your knowledge, if they did?

A. Absolutely not. They are allowed in the plant. A credited representative of the union, business agent and so forth are allowed in the plant for the servicing of the contract only.

Q. This is one of those agents. You can't keep them out under the terms of the contract?

A. That's right. That is the law.

Q. You didn't permit any campaigning on their behalf to go on in the plant?

A. On anybody's behalf.

Trial Examiner: Under the contract you have does it restrict actions to working time?

Mr. Macomber: I read the other day that por-

(Testimony of Mitchell J. Simon.)

tion of the contract "Union representatives properly accredited to the company by the union shall have access to the plant for the purpose of contacting committeemen and/or employees." [700] And "The company, shall not impose regulations which will have the effect of excluding the union representative from the plant."

Trial Examiner: It was with relation to the last part of it that I was wondering if you considered that part of the contract, you had the right to limit the time of access to non-working time.

The Witness: No, we feel if they were overdoing and we saw it, they'd be good enough to stop if we asked them to.

Q. (By Mr. Macomber): You had no abuse of that provision, I take it? A. No.

Q. I think I have asked you this question before but I will conclude on that, anyway.

With respect to both, the discharge, dismissal or voluntary quits of either of these complainants, did you have in mind any intention, or any responsible party of management of Essex Wire Corporation, was it the intention to discriminate against either of these employees?

A. Absolutely not and I can cite as an example there are other people who are equally as responsible in the UMW who are working in our place and probably will work there for 20 years as long as they do their job.

Mr. Macomber: You may cross-examine. [701]

(Testimony of Mitchell J. Simon.)

Cross-Examination

By Mr. Grodsky:

Q. Did you have labor management meetings in your plant in which representatives of the union participated?

A. Yes, Mr. Harms handled those generally. The routine labor management meetings Mr. Harms handled those.

Q. How frequently are those meetings held?

A. I think he has them once a month. I'm not sure.

Q. Do you know whether prior to the time that the Mine Workers Union showed interest, whether representatives of the IAM appeared or participated in those meetings?

A. I think they always have.

Q. Do you know that there was an employee by the name of Vivian Moore who was the president of the local in the shop?

A. I knew her very well.

Q. And you knew there was a time she was president of the local?

A. I don't know that she was president. I knew she was an officer of some kind.

Q. All right. During the time that she was an officer, do you know whether the IAM representatives participated?

A. Participated in what?

Q. In the labor management meetings?

A. Yes, I think so.

(Testimony of Mitchell J. Simon.)

Q. Mrs. Evans in her testimony made reference to a conference [702] with you in which she called your attention to cards being circulated by the IAM to revoke the authorization of the UMW. Do you recall any such conversation with her in which the matter came up? A. Yes, sir.

Q. And do you recall, what is your recollection as to that conversation?

A. Pretty much along the same lines as I previously stated about union membership and I also told them that they, if anybody was passing out or passing out union literature or petitions during company time that they are subject to the policy set forth by the company, that it's unallowable.

I, personally, never saw neither J. C. Hamilton nor Jimmie Juhl nor any member of the IAM passing out anything because it's typical, when I'm in the plant, they are nothing but angels. Everybody is saintly and any two people that are talking about personnel or otherwise, they are moving their hands like they are supposedly working. I have been all through that because I have been an employee for many years. They haven't fooled anybody.

Q. When Loraine called your attention to the fact that there were such cards being circulated, did she mention that Dorothea Randall was doing it, do you recall?

A. No, I don't. She didn't name any names at all as far as I can remember. She just generally told me. [703]

Q. I see. Well, do you know of your own knowl-

(Testimony of Mitchell J. Simon.)

edge who prepared those petitions which had the signatures, in other words, who typed that thing on top?

A. Counsel, the only thing I know of the petition is, as I stated the first time, I saw them when they were laid in front of me.

Trial Examiner: Did you undertake any investigation of the report that you heard from Mrs. Evans about the circulation of these cards?

The Witness: Absolutely. I, even before Mrs. Evans mentioned it, I told the boys in the plant. I said, "Look, this is one thing that we cannot get mixed up into. I don't want, I want you to be certain that you all walk the middle of the road and neither lean one way or the other. You report anything you see."

And those were my instructions to the plant boys.

Trial Examiner: When you say "plant boys," you mean the supervisory personnel?

The Witness: The staff, yes, sir.

Mr. Grodsky: I have no further questions.

Trial Examiner: You may be excused.

(Witness excused.)

Trial Examiner: Anything further on behalf of the Respondent?

Mr. Macomber: I believe we rest. We do rest at this time. [704]

Mr. Grodsky: Before proceeding, I would like to move to amend for lack of proof on my part Paragraph 6 (a) (3) of the complaint insofar as it

refers to Gerald W. Pipmeier, and I wish to achieve it by amending out and by excluding the following words after the name of M. J. Simon on Line 1 of Subparagraph 3, strike out the words, "On or about February 8, 1954, directing Gerald W. Pipmeier to remove his UMW button, and."

Trial Examiner: I gather there is no objection?

Mr. Macomber: No, I have no objection.

* * *

Trial Examiner: Just a moment. Let me dispose of the pending motion. The motion to amend is granted.

Mr. Macomber: You can strike any part or all of that as far as I'm concerned.

I believe it will be stipulated that under date of March 17, 1954, in what purports to be the handwriting of Gerald W. Pipmeier, the same gentleman whose name was the subject of a motion on behalf of General Counsel and whose name is frequently interspersed in the record, that there came addressed a communication to the Essex Wire Corporation, San Diego, California, as follows: "Dear Gentlemen: Please consider this as my letter of resignation effective at once. I have found other employment which I consider better. Working [705] at Essex Wire has been a pleasure and most pleasant period. Respectfully signed, Gerald W. Pipmeier."

I offer this for what it's worth.

Trial Examiner: Any objection?

Mr. Grodsky: No objection.

Mr. Macomber: Without offering the letter, I take it, it may constitute part of the record without offering the letter itself unless you want it.

Trial Examiner: Very well, in effect, I gather counsel have stipulated that a letter of the tenor read by counsel was received by the company.

Mr. Grodsky: That's right.

Trial Examiner: Very well, the stipulation is noted for the record.

Mr. Grodsky: And, Mr. Examiner, before I proceed with my rebuttal, I propose a stipulation which I have discussed with counsel to the effect that if a Field Examiner, Karl Filter, were called to testify, he would testify that on February 12 he took a statement from Mrs. Hamilton that at that time her fingers were partially covered with gauze bandages but that was the extent of his observation of her hands. He did not make a careful examination of her hands to determine the extent to which they may have been injured.

Mr. Macomber: I will stipulate that if the gentleman last named in the proposed stipulation were called to testify [706] he would so testify and that he may be, for the purposes of this record, deemed to have so testified.

Trial Examiner: Very well. The stipulation is noted for the record. [707]

Received August 15, 1954.

[Title of Board and Cause.]

CERTIFICATE OF THE NATIONAL
LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board-Series 6 as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, "Essex Wire Corporation, a Michigan corporation, d/b/a Essex Wire Corporation of California and Ann Hamilton, an Individual," Case No. 21-CA-1921; and "Essex Wire Corporation, a Michigan corporation, d/b/a Essex Wire Corporation of California and Loraine L. Evans, an Individual," Case No. 21-CA-2035 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said consolidated proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony taken before Trial Examiner Maurice M. Miller on August 2 through 5, 1954, together with all exhibits received in evidence.

2. Copy of Trial Examiner's Intermediate Report and Recommended Order (annexed to item 5

hereof) and copy of order transferring cases to the Board, both dated February 15, 1955, together with affidavit of service and United States Post Office return receipts thereof.

3. General Counsel's exceptions to the Intermediate Report and Recommended Order received by the Board on March 23, 1955.

4. Respondent's exceptions and request for oral argument received by the Board on March 23, 1955. (Request for oral argument denied, see page 1, footnote ¹ of Board's Decision and Order.)

5. Copy of Decision and Order issued by the National Labor Relations Board on July 28, 1955, with Intermediate Report and Recommended Order annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 30th day of April, 1956.

[Seal]

NATIONAL LABOR
RELATIONS BOARD,

/s/ FRANK M. KLEILER,
Executive Secretary.

[Endorsed]: No. 15077. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Essex Wire Corporation, a Corporation, Doing Business as Essex Wire Corporation of California, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed May 7, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

ESSEX WIRE CORPORATION, a Michigan
Corporation, d/b/a ESSEX WIRE CORPO-
RATION OF CALIFORNIA,

Respondent.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Secs. 151, et seq.) hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Essex Wire Corporation of California, San Diego, California, its officers, agents, successors, and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "Essex Wire Corporation, a Michigan corporation, d/b/a Essex Wire Corporation of California and Ann Hamilton, an Individual," Case No. 21-CA-1921; and "Essex Wire Corporation, a Michigan corporation, d/b/a Essex Wire Corpora-

tion of California and Loraine L. Evans, an Individual," Case No. 21-CA-2035.

In support of this petition the Board respectfully shows:

(1) Respondent is a Michigan corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the board in said matter, the Board on July 28, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and

transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing those sections of the Board's said Order which relate specifically to the Respondent herein, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

Dated at Washington, D. C., this 22nd day of March, 1956.

NATIONAL LABOR
RELATIONS BOARD,

/s/ MARCEL MALLET PREVOST,
Assistant General Counsel.

Certificate of Service attached.

[Endorsed]: Filed March 23, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
PETITIONER INTENDS TO RELY

In this proceeding, the National Labor Relations Board will urge and rely on the following point:

The Board properly found that the respondent violated Section 8(a) (1) of the Act by demanding

that an employee surrender the executed union authorization cards he had in his possession, by prohibiting union activity during employee rest periods, and by requiring the removal of buttons denoting adherence to the rival union while permitting employees to wear the membership buttons of the incumbent union.

Dated at Washington, D. C., this 30th day of April, 1956.

NATIONAL LABOR
RELATIONS BOARD.

/s/ MARCEL MALLET PREVOST,
Assistant General Counsel.

[Endorsed]: Filed May 2, 1956.

[Title of Court of Appeals and Cause.]

RESPONDENT'S ANSWER TO PETITION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS
BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Respondent, Essex Wire Corporation, a Michigan corporation, d/b/a Essex Wire Corporation of California, through its attorneys, Holt, Macomber & Graham, in answer to the Petition for Enforcement filed by the National Labor Relations Board, in the above-entitled case, replies as follows:

1. Respondent admits the allegations of Paragraph 1.

(2) Respondent admits the allegations of Paragraph 2, but does not admit the validity of the Board's decision insofar as it finds Respondent to have engaged in any unfair labor practice of any kind, and specifically denies that it was guilty of any unfair labor practice whatsoever.

Wherefore, Respondent prays this Honorable Court that it deny the Petition for Enforcement, and that it cause notice of the filing of this answer to be served upon the Petitioner herein.

Dated this 1st day of May, 1956, at San Diego, California.

HOLT, MACOMBER &
GRAHAM,

By /s/ WILLIAM H. MACOMBER,
Attorney for Respondent, Essex Wire Corporation
of Michigan, d/b/a Essex Wire Corporation of
California.

[Endorsed]: Filed May 3, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
RESPONDENT INTENDS TO RELY

In this proceeding, the respondent, Essex Wire Corporation, will urge and rely on the following points:

It was improperly found by the Board that the Respondent violated Section 8(a) (1) of the Act in any manner whatever.

Dated at San Diego, California this 25th day of May, 1956.

HOLT, MACOMBER &
GRAHAM,

/s/ WILLIAM H. MACOMBER,
Attorney for Respondent, Essex Wire Corporation,
a Michigan Corporation, Doing Business as Essex Wire Corporation of California.

[Endorsed]: Filed May 26, 1956.

No. 15077

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ESSEX WIRE CORPORATION, A MICHIGAN CORPORATION,
D/B/A ESSEX WIRE CORPORATION OF CALIFORNIA, RE-
SPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

THEOPHIL C. KAMMHOLZ,
General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel.

SAMUEL M. SINGER,
MYRON S. WAKS,
*Attorneys,
National Labor Relations Board.*

FILED

OCT - 5 1956

PAUL P. O'BRIEN, CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 15077

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ESSEX WIRE CORPORATION, A MICHIGAN CORPORATION,
D/B/A ESSEX WIRE CORPORATION OF CALIFORNIA, RE-
SPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order (R. 4-5)¹ issued against the Essex Wire Corporation, a Michigan corporation, d/b/a Essex Wire Corporation of California (hereinafter referred to as the Company), on July 28, 1955, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*). The Board's decision and order are reported

¹ References to the printed record are designated "R." References preceding a semicolon are to the Board's findings; references following a semicolon are to the supporting evidence.

in 113 NLRB 344. This Court has jurisdiction under Section 10 (c) of the Act, the unfair labor practices having occurred at San Diego, California, within this judicial circuit.²

STATEMENT OF THE CASE

I

The Board's findings of fact and conclusions of law

Briefly, the Board found that the Company violated Section 8 (a) (1) of the Act by demanding that an employee surrender signed union membership cards in his possession, by prohibiting rival union activity during employee rest periods, and by requiring the removal of buttons denoting adherence to the rival union while permitting employees to wear buttons of the incumbent union. The subsidiary facts upon which these findings were based, which were not in dispute before the Board (R. 130, n. 2) are summarized below.

At all times material to this case the exclusive bargaining representative for the Company's employees at San Diego was Silvergate District Lodge No. 50 for and in behalf of Automotive Electric Lodge No. 1930 of the International Association of Machinists, hereinafter referred to as the IAM. The collective bargaining agreement between the Company and

² The respondent Company is a multistate business which manufactures and sells wire products in various states of the United States. A substantial amount of the product manufactured at the Company's San Diego plant is shipped to places outside the State of California. The respondent admits, and the Board has found, that the Company is engaged in commerce within the meaning of the Act (R. 30-31; 139-140, 16, 23).

the IAM during the period here relevant was entered into January 15, 1953, and extended through May 15, 1954 (R. 38; 159-162).

Late in 1953, several of the Company's employees became interested in the United Mine Workers, District 50 (hereinafter referred to as the UMW), as their bargaining representative and in December 1953 started an organizational campaign on behalf of the UMW (R. 39; 314, 322, 336-337). Active in this campaign were employees J. C. Hamilton, his wife, Elizabeth Ann Hamilton, his sister, Mrs. Loraine Evans, and James A. Juhl (R. 39; 194-195, 220, 306, 314, 337). Mrs. Evans was designated as the chairman of the UMW's organizational campaign and with other employees, undertook the solicitation of authorization cards before and after the holidays, both at the homes of the employees and at the plant (R. 39; 195, 197, 314, 336-337). Solicitation on behalf of the UMW at the plant was confined to nonworking time, including lunch periods, and the established morning and afternoon rest periods (R. 39-40; 197, 212, 226, 314-316, 336, 341, 451-452, 457-458, 486).³

Early in January 1954, employee Juhl helped to distribute UMW "membership" cards (R. 40; 194-195). On the day after he initiated this activity he was accosted by his department foreman, Clyde Casey (R. 40; 195). Foreman Casey asked Juhl if he was passing out UMW membership cards. When Juhl

³ The lunch period for the plant was from 12-12:30 p. m.; there were 10-minute rest periods at 10 a. m. and 2:30 p. m. (R. 208-209, 219).

admitted that he was, Casey asked him if he had been able to get any of them signed. Juhl said he had. Casey then asked "What are you trying to do make a fool out of me?" When Juhl replied that he was not, Casey asked him where the cards were. Juhl answered that he had the cards with him. Casey then asked, "Don't you like your job here?" Juhl replied that he did and Casey then told him, "I want those cards in my office in five minutes" (R. 40-41; 195-196, 18-19, 25). Juhl, faced with this demand, and at what he believed to be the risk of discharge, returned the cards to the employees who had signed them and then reported to Casey what he had done (R. 41; 196). Casey then informed Juhl that in order for him to campaign for and get a new bargaining representative he must first notify the "front office" and then wait until the IAM contract had expired and a representation election had been held (R. 41; 196).

The UMW's organizational campaign gave rise to considerable discussion among the employees with respect to the right of the UMW adherents to engage in such activity (R. 41-42; 169-170, 448, 450, 428). Production Manager Simon became aware of the situation and in the early part of January he telephoned the Company's legal department in Detroit, Michigan, for advice with respect to the course of conduct he ought to follow (R. 42; 166, 172, 173). In substance Simon was advised to follow a middle course and to avoid any display of partisanship in the factual dispute, but to insist that no organizational activity be conducted during working hours (R. 42; 171-172).

Simon was also informed that the distribution of union pins and their passage from one employee to another during working hours constituted union activity on company time which the Company could prohibit (*Ibid.*). Thereafter, Simon instructed the Company's supervisors, orally, to maintain this middle course and to insist that Company time be devoted to work (R. 42; 168, 173). Within a day after his Detroit call Simon issued a warning to employee Gerald W. Pipmeier, a UMW adherent, about passing UMW pins among the employees during working hours (R. 43-44; 173-174).

On January 14, 1953, within two days after Simon's instructions from Detroit, the Company posted the following notice (R. 44-45; 158-159, 172, 278-280).

TO: ALL EMPLOYEES

IT HAS COME TO OUR ATTENTION THAT OUR EMPLOYEES ARE ENGAGED IN UNION CAMPAIGNING DURING WORKING HOURS. ANY SUCH CAMPAIGNING FOR ANY UNION DURING WORKING HOURS IS CONTRARY TO COMPANY RULES AND, THEREFORE, THOSE INVOLVED ARE SUBJECT TO DISCIPLINARY ACTION.

WE REQUEST THOSE INVOLVED CAMPAIGNING FOR ANY PURPOSES ON COMPANY TIME REFRAIN FROM THESE PRACTICES IN ORDER THAT WE MAY NOT BECOME INVOLVED IN SOME UNDESIRABLE INCIDENTS.

Production Manager Simon interpreted this rule to preclude any campaign activity during the morning

and afternoon rest periods for the reason that the employees were paid for this time by the Company; and he so instructed the UMW adherents (R. 45-47, 48-50, 83-84; 19, 25, 197, 211-212, 226). Thus shortly after the notice was posted Foreman Casey took Juhl to see Simon, who asked Juhl whether he was campaigning on company time (R. 45, 83; 174, 197). Juhl denied that he was doing any campaigning on company time but admitted to Simon that he was campaigning on company property during the lunch hour and rest periods. At that time Simon instructed Juhl that the rest periods were company time because the employees were being paid for it (R. 45-47, 83-84; 197, 211-212). Again, on February 8, when Simon was speaking with J. C. Hamilton about Hamilton's UMW activity, Simon warned Hamilton that there was to be no campaigning on company time and in the course of this conversation Simon stated, "I pay you for the break and that is my time" (R. 49-50; 226).

For a number of years prior to the advent of the UMW activity, many employees at the San Diego plant had worn IAM buttons while at work (R. 47; 389-391, 428, Tr. 578).⁴ With the start of the UMW organizational campaign, the employees were urged by the IAM to wear buttons as a sign of their "loyalty" to that organization, and many more employees did so (R. 47, 86; Tr. 578, 390-391). On one occasion around February 1, 1954, one of the IAM representatives engaged in the distribution of IAM buttons to

⁴ Petitioner's designation of page 578 of the original transcript was inadvertently omitted from the printed appendix.

the employees during working hours (R. 47-48; 221-222, 239-240). On Monday, February 8, pursuant to the advice of a UMW representative, the Hamiltons publicly acknowledged their adherence to that organization by donning UMW buttons at work (R. 48; 220, 314, 321). Several IAM adherents brought to Foreman King's attention the fact that Mrs. Hamilton was wearing a UMW button, and complained of the "dissension" which the UMW campaign had engendered (R. 55, 86; 448, 450, 455-458). King sought advice from Simon as to the Company's policy in this situation, but without waiting for Simon's answer, approached Mrs. Hamilton at her machine and asked if she was not aware of the Company rule prohibiting campaigning on company time (R. 54-55; 448-449, 315-316). When Mrs. Hamilton replied that she was not campaigning on company time King pointed to her UMW button, stating "You are wearing that badge" (R. 54-55; 316). Mrs. Hamilton insisted that this was not campaigning, but King ordered her to take off the UMW button (R. 54-55; 316). When Mrs. Hamilton, referring to the IAM buttons which were being worn, complained "I [don't] see why I'm not allowed to wear my badge if other people are," King replied merely, "Well, we think you are campaigning and you have to take your badge off," and walked away (R. 54-55; 316).

On the morning of February 10, pursuant to the renewed advice of a UMW representative, Mrs. Hamilton again wore her UMW button at work (R. 55; 316, 323-324). This time, shortly after the work

began, Mrs. Hamilton was approached by Section Foreman Kresin who ordered her to remove her UMW button (R. 55-56; 317).⁵ Kresin stated to Mrs. Hamilton, "Ann, I don't want you to start any fussing or fighting back in the plant about wearing your badge" (R. 55-56; 317). Mrs. Hamilton protested that the other employees were wearing union buttons and assured Kresin that she wasn't "going to say anything to anyone," that "if anything [was] said, they [would] say it to [her]." (R. 55-56; 317, 318.) Kresin did not comment on Mrs. Hamilton's reference to the IAM buttons that were being freely worn but insisted that she remove her UMW button and walked away (R. 56; 317-318).⁶ There is no evidence of any further UMW organizational activity at the San Diego plant after February 10, 1954 (R. 59).

On the basis of the foregoing facts the Board concluded that the Company by demanding the surrender of executed union authorization cards, prohibiting union solicitation during nonworking hours, and prohibiting the wearing of union buttons by the adherents of one of two competing unions, had interfered with, restrained, and coerced its employees in violation of their Section 7 rights and thereby had violated Sec-

⁵ Earlier in the week employees Redden and Dorothy Randall, both adherents of the IAM, had complained to Kresin about the UMW buttons (R. 56; 428-430).

⁶ King, as well as Kresin, admitted that they were aware of the IAM buttons being worn in the plant (R. 428-429, 447-448).

tion 8 (a) (1) of the Act.⁷ In so doing, the Board rejected respondent's argument that employees' concerted activity is unprotected when undertaken for a union not in compliance with the filing and reporting requirements of Section 9 (f), (g) and (h) of the Act. In addition, the Board found no basis in the record to support respondent's further contention that Hamilton and Evans were "fronting" for the UMW when they filed charges with the Board (R. 129-130, 33-34).

II

The Board's order

The Board's order (R. 133-135) requires the respondent Company to cease and desist from the unfair labor practices found and from any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act; affirmatively, it requires the Company to post appropriate notices.

⁷ The Trial Examiner in resolving the conflicting testimony of witnesses failed to find that the Company had engaged in other acts of interference as the General Counsel had contended (R. 45-59, 84-85, 87-90). In addition, the Trial Examiner dismissed that part of the complaint which alleged that Mrs. Evans was discriminatorily discharged by the Company but found that Mrs. Hamilton was constructively discharged on February 10, 1954, in violation of Section 8 (a) (3) (R. 119-120). The Board adopted the Trial Examiner's findings in full except those relating to Mrs. Hamilton, and dismissed the allegations in the complaint relating to her discharge (R. 128-133).

ARGUMENT

I

The Board properly found that respondent interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act

The facts set forth *supra*, pp. 3-8, establish that respondent demanded the surrender of executed UMW authorization cards by employee Juhl, applied its rule prohibiting union solicitation to the employees' rest periods, and forbade the wearing of UMW buttons while permitting the adherents of the incumbent union to wear IAM buttons without restriction. Respondent took no exception to the Trial Examiner's findings that these incidents occurred, but only to the conclusion that they constituted violations of the Act (R. 125-128).⁸ For the reasons stated below we respectfully submit that the conclusions reached by the Trial Examiner and adopted by the Board are entirely proper.

As the Board stated (R. 82), Casey's demand that Juhl surrender to him executed UMW cards "clearly represented an unlawful intrusion upon the statu-

⁸ Respondent's failure to file such exceptions precludes respondent from challenging the Trial Examiner's findings in this regard. Section 10 (e); *N. L. R. B. v. Cheney California Lumber Co.*, 327 U. S. 385; *N. L. R. B. v. Marshall Field & Co.*, 318 U. S. 253, 255-256; *N. L. R. B. v. Seven-up Bottling Co.*, 344 U. S. 344, 350; *N. L. R. B. v. Pinkerton's National Detective Agency, Inc.*, 202 F. 2d 230, 233 (C. A. 9). In any event, these findings were based on direct testimony which was credited by the Trial Examiner and such credibility findings are entitled to acceptance by this Court. *N. L. R. B. v. San Diego Gas & Electric Co.*, 205 F. 2d 471, 475 (C. A. 9); *N. L. R. B. v. West Coast Casket Co.*, 205 F. 2d 902, 907 (C. A. 9).

torily guaranteed right of Respondent's employees to engage in concerted activity for their mutual aid and protection." Casey's demand was accompanied by the accusation that Juhl was trying to make a "fool" of him and by an implied threat of discharge if he solicited employees for union membership. Such conduct on the part of Casey which clearly tended to interfere with, restrain and coerce the employees in the exercise of their right to engage in organizational activity was violative of Section 8 (a) (1) of the Act. See *N. L. R. B. v. Globe Wireless*, 193 F. 2d 748, 751-752 (C. A. 9); *N. L. R. B. v. West Coast Casket Co.*, 205 F. 2d 902, 904 (C. A. 9); *N. L. R. B. v. Kanmak Mills, Inc.*, 200 F. 2d 542, 543 (C. A. 3).

Respondent in its answer to the amended complaint (R. 25) admitted that Casey had "demanded of James A. Juhl that he turn over certain cards" to him, but contended that the demand was prompted by the fact that Juhl solicited during "working hours." However, the record does not show that Juhl solicited the cards in question during working hours or that Casey connected his demand for the cards with union activity during working hours (R. 40-41, 82-83; 196, 197). As the Board stated in respect to respondent's contention (R. 82-83), "These averments in the Respondent's Answer, of course, cannot be treated as evidence."

Similarly, the Board's finding that respondent had further violated Section 8 (a) (1) by applying its rule prohibiting union activity to nonworking hours, more particularly to the established employee rest

periods, was proper. Respondent did not challenge the validity of the settled rule that absent special considerations relating to production or plant discipline (not urged or shown to be here present), an employer may not issue a broad rule prohibiting union solicitation by its employees on company property. *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 803-804, reaffirmed in *N. L. R. B. v. Babcock & Wilcox Co.*, 351 U. S. 105, 113. Respondent, however, takes the position that an employer may prohibit such activity during "company time"—i. e., during time for which the employees are being paid by the Company, notwithstanding the fact that such time may be non-working time. This precise issue was treated by the Court of Appeals for the Fifth Circuit in *Olin Industries, Inc. v. N. L. R. B.*, 192 F. 2d 613, certiorari denied, 343 U. S. 919, and the Court's rationale in dismissing this contention fully sets forth the Board's position in this matter. The Court stated (at p. 617):

* * * The argument that since the employees were paid during these lunch and rest periods they actually constituted company time and were subject to company rules is without support or foundation. We think the Board has properly approached this problem of solicitation on company property on the basis of the distinction between actual working and non-working time, rather than on the basis of the immaterial distinction between paid and unpaid time. The proper rule was recognized by the Board in *Peyton Packing Company*, 49 N. L. R. B. 828, 843-844, enforced by this Court, *N. L. R. B. v. Peyton Packing Co.*, 142 F. 2d 1007, certiorari denied, 323 U. S. 730, 65 S. Ct.

66, 89 L. Ed. 585, and quoted with approval by the Supreme Court in *Republic Aviation Corp. v. N. L. R. B.* and (*N. L. R. B. v. LeTourneau*), 324 U. S. 793, 803-804, 65 S. Ct. 982, 89 L. Ed. 1372; "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or *during luncheon or rest periods*, is an employee's time to use as he wishes without unreasonable restraint although the employee is on company property * * *." [Emphasis added.] See, also, *N. L. R. B. v. May Department Stores*, 8 Cir. 154 F. 2d 533, 537.

Any other rule might seriously impair the right of employees to organize collectively under the Act by placing a premium on attempts by employers to allocate wages or salaries and company time over the entire work week, so as to prohibit employees from discussing union activities or soliciting union membership at practically any convenient time. Clearly the Act does not require enforcement of such a harsh rule of silence upon employees.

See also, *N. L. R. B. v. The Monarch Machine Tool Company*, 210 F. 2d 183, 187 (C. A. 6), certiorari denied, 347 U. S. 967.

Finally, the application by respondent's officials of its rule prohibiting union activity to enforce a re-

quirement that UMW buttons would have to be removed while at the same time putting no restrictions on the right to wear IAM buttons was discriminatory and violated Section 8 (a) (1) of the Act. The wearing of union buttons has long been recognized as a traditional and effective instrument in the conduct of a union's organizational campaign.⁹ And wholly apart from whether it is discriminatorily applied, an employer's prohibition against the wearing of the usual union insignia in the absence of special considerations relating to plant discipline has been held to be unwarranted interference with the employees' right to engage in organizational activity. *N. L. R. B. v. Republic Aviation Corp.*, 324 U. S. 793, 802; *Kimble Glass v. N. L. R. B.*, 230 F. 2d 484 (C. A. 6), enforcing 113 NLRB 577; *Caterpillar Tractor Co. v. N. L. R. B.*, 230 F. 2d 357, 359 (C. A. 7). Respondent has not contended nor does the record show the existence of special circumstances such as would justify a restriction on the employees' right generally to wear union insignia.¹⁰ Furthermore, under no circumstances could respondent as here, deprive a rival union of the right to an important organizational technique while permitting it to the incumbent union. For by so handicapping the organizational campaign of one of two unions competing to represent its employees,

⁹ As the Board stated in *Salant & Salant, Inc.*, 92 NLRB 417, 426: "The wearing of union buttons by employees * * * has an important function during a union campaign. It prompts solidarity among union members, and signifies their membership and determination to accomplish the unionization."

¹⁰ Compare *Boeing Airplane Co. v. N. L. R. B.*, 217 F. 2d 369 (C. A. 9).

the employer interferes with “that freedom of choice [of a collective bargaining agent] which is the essence of collective bargaining” and which Section 7 seeks to guarantee (*I. A. M. v. N. L. R. B.*, 311 U. S. 72, 79).

Accordingly, the Board properly concluded that respondent interefered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act.

II

The Board properly rejected respondent’s contentions relating to Section 9 (f), (g), and (h) of the Act

At the hearing before the Board, respondent pointed to the fact that the UMW was not in compliance with the filing requirements of Section 9 (f), (g), and (h) of the Act and urged that the right to self-organization guaranteed by Section 7 of the Act does not extend to organizational activity undertaken on behalf of a noncomplying union. In its brief to the Trial Examiner, respondent relied on the non-compliance status of the UMW in urging that employees Hamilton and Evans, while filing separate charges as individuals (R. 3-5, 11-13) were in fact “fronting” for the UMW. Before the Board respondent without amplification took exception merely to the finding that the UMW was a labor organization within the meaning of the Act. While it would appear that respondent’s failure to make more explicit its contention before the Board would preclude it from raising the issue before this Court,¹¹ respondent’s

¹¹ *Supra*, p. 10, n. 8.

defenses stemming from the noncompliance of the UMW in any event are without merit.

It is now settled law that employees' concerted activity does not lose the protection otherwise afforded by Section 7 of the Act because it is undertaken on behalf of a union which is not in compliance with Section 9 (f), (g), and (h). *United Mine Workers v. Arkansas Flooring Co.*, 351 U. S. 62; *News Printing Co., Inc. v. N. L. R. B.*, 231 F. 2d 767, 769 (C. A. D. C.); *N. L. R. B. v. Ronney & Sons Mfg. Co.*, 206 F. 2d 730, 732 (C. A. 9); *N. L. R. B. v. Pecheur Lozenge Co.*, 209 F. 2d 393, 402-403 (C. A. 2), certiorari denied, 347 U. S. 593. "Section 7, which deals with the employees' rights to self-organization and representation, makes no reference to any need that the employees' chosen representative must have complied with Sections 9 (f), (g), and (h) * * * Subsections (f), (g), and (h) of Section 9 merely describe advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those listed shall result from noncompliance." *United Mine Workers v. Arkansas Flooring Co.*, 351 U. S. at pp. 72-73.

Similarly, without merit is respondent's contention that while they filed charges as individuals, employees Hamilton and Evans were "fronting" for the UMW, allegedly the real party in interest in the proceeding. The question whether or not an employee filing charges is "fronting" for a noncomplying

union is a question of fact. *Southern Furniture Mfg. Co. v. N. L. R. B.*, 194 F. 2d 59, 61 (C. A. 5), certiorari denied 343 U. S. 964; *N. L. R. B. v. Coal Creek Co.*, 204 F. 2d 579, 582 (C. A. 10). However, as the Board found (R. 34), “nothing in the charges, the First Amended and Consolidated Complaint, or the evidence suggests an attempt, in this case, to vindicate or assert any right or interest of the Mine Workers as a labor organization under the statute.” Both employees Hamilton and Evans had been employed by the Company for many months prior to the UMW’s appearance on the scene (R. 313, 336). It appears that their only connection with the UMW was as employees sufficiently interested in the UMW as a bargaining agent to solicit members on its behalf, Mrs. Evans acting as chairman of the group of employees who were active for the UMW. And, contrary to respondent’s contention, the fact that an employee takes “quite an active part in organizational activities” on behalf of a noncomplying union is “not of itself decisive” of the fronting issue. *N. L. R. B. v. Beaver Meadow Creamery, Inc.*, 215 F. 2d 247, 249–250 (C. A. 3). The courts have uniformly held that the fact that the employees who had filed individual charges were officers of or had actively solicited for a noncomplying union, was insufficient to establish that in filing the charges they were “fronting” for the union. *N. L. R. B. v. Clausen*, 188 F. 2d 439, 443 (C. A. 3), certiorari denied, 342 U. S. 868; *N. L. R. B. v. Coal Creek Co.*, 204 F. 2d 579, 582 (C. A. 10); *Beaver Meadowbrook, supra*, 215 F. 2d at pp.

249-250.¹² Here, as in the cases noted, the charges filed were substantially the "assertions of individual rights"¹³ of the employees; in both cases the employees, believing that their discharges had been discriminatorily motivated, were seeking reinstatement to their jobs and back pay and an end to the employer's unlawful interference in their organizational activity.¹⁴

¹² Indeed, as this Court has held, even where the disqualified union was active in assisting or directing the employees in preparing their charges, it does not follow that the employees, by accepting that assistance disqualified themselves. *N. L. R. B. v. Ronney & Sons Mfg. Co.*, 206 F. 2d 730, 731-732.

¹³ *Ronney* case, *supra*, at p. 732.

¹⁴ Respondent's reliance on *N. L. R. B. v. Happ Bros.*, 196 F. 2d 195 (C. A. 5) and *N. L. R. B. v. Alside*, 192 F. 2d 678 (C. A. 6), is misplaced. It was the particular combination of circumstances in the *Happ* and *Alside* cases which led the Courts to reverse the Board in finding that the charging parties were "fronting" for a non-complying union. In both cases the charging party was not only president and chief protagonist for the interested but disqualified union but also had filed charges on behalf of a great number of other union members, in addition to himself. In the instant case, neither of the employees was an officer of the UMW. The charge filed by Mrs. Evans, who was chairman of the employees engaged in UMW organizational activity, was limited strictly to her individual grievances (R. 11-13). Mrs. Hamilton's charge (R. 3-5) aside from alleging the discharge of one other employee (not named in the complaint or otherwise mentioned in the record) deals with her own grievances, alleging her discharge to discourage UMW membership and in general terms respondent's unlawful interference. Cf. *Southern Furniture Mfg. Co. v. N. L. R. B.*, 194 F. 2d 59, 61 (C. A. 5), certiorari denied, 343 U. S. 964; *N. L. R. B. v. Beaver Meadow Creamery, Inc.*, 215 F. 2d 247, 249-250 (C. A. 3).

The Board's order, which remedies the volations of Section 8 (a) (1) inures directly to the employees' benefit by vouchsafing their rights under Section 7. No particular union is named in the Board's order and no particular union is intended as the beneficiary of such order. The important individual rights which are thus assured to the employees "[are] not made less so because [the UMW] might *incidentally* benefit from the Board's order." *Ronney* case, *supra*, 206 F. 2d at p. 731 (emphasis supplied).

CONCLUSION

For the reasons stated above, we respectfully submit that a decree should issue enforcing the order of the Board.

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OCTOBER 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

“(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

“(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.”

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

“(1) the name of such labor organization and the address of its principal place of business;

“(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

“(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

“(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

“(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

“(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling

of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;”

and (B) can show that prior thereto it has—

“(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

“(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.”

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative

action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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No. 15077

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

ESSEX WIRE CORPORATION, A MICHIGAN CORPORATION dba
ESSEX WIRE CORPORATION OF CALIFORNIA, RESPONDENT,

On Petition For Enforcement Of An Order Of The
National Labor Relations Board

BRIEF FOR ESSEX WIRE CORPORATION,
A MICHIGAN CORPORATION, D/B/A ESSEX WIRE
CORPORATION OF CALIFORNIA,

HOLT, MACOMBER & GRAHAM
AND FRANKLIN B. ORFIELD
Attorneys for Respondent

FILED

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No. 15077

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

ESSEX WIRE CORPORATION, A MICHIGAN CORPORATION dba
ESSEX WIRE CORPORATION OF CALIFORNIA, RESPONDENT,

On Petition For Enforcement Of An Order Of The
National Labor Relations Board

BRIEF FOR ESSEX WIRE CORPORATION,
A MICHIGAN CORPORATION, D/B/A ESSEX WIRE
CORPORATION OF CALIFORNIA,

JURISDICTION

The respondent admits jurisdiction of this Honorable Court under the National Labor Relations Act, the Respondent Company being a multi-state business, which manufactures and sells wire products in various parts of the United States.

Statement of the Case

I

The Board's findings of fact and conclusions of law.

The Board erroneously found that the respondent company violated Section 8 (a) (1) of the Act by demanding that an employee surrender signed Union Membership Cards in his possession, by prohibiting rival union activity during employee rest periods, and requiring the removal of buttons denoting adherence to the rival union, while permitting employees to wear buttons of the incumbent union. The subsidiary facts upon which these findings and conclusions were based do not support the Board's findings of fact and conclusions of law and are summarized below:

At all times material to this case, the exclusive bargaining representative for the respondent company's employee was Silvergate District Lodge No. 50, for and on behalf of Automotive Electric Lodge No. 1930 of the International Association of Machinists, hereinafter referred to as I.A.M. The collective bargaining agreement between the company and the I.A.M. during the period here relevant was entered into January 15, 1953, and extended through May 15, 1954. (References to the printed record are designated, "R"). (R. 38; 159-162).

Late in 1953, several of the company's employees became interested in the United Mine Workers, District 50 Union, (hereinafter referred to as the U.M.W.), as their bargaining representative, and in December 1953, started an organizational campaign on behalf of the U. M. W.

Active in this campaign were employees, J. C. Hamilton, his wife, Elizabeth Ann Hamilton, his sister, Mrs. Lorraine Evans and James A. Juhl.

J. C. Hamilton and James A. Juhl actively campaigned during company time. (R. 173, 209-210, 243, 307, 309, 311, 386, 388, 396, 419, 443). The activity of the U.M.W. came to the attention of management and on January 14, 1954, a bulletin was posted prohibiting union campaigning during working hours. (R. 158-159, 166, 168-172). Instructions were requested from the home office in Detroit and those instructions were in turn passed on to the responsible officials in the plant through the plant's manager, Mitchell J. Simon. (R. 166-172). All employees both I.A.M. and U.M.W. adherents were advised through management that the company was not going to participate in any factional disputes and that company time was not to be used for the purpose of continuing the inter-union controversy. The orders that were issued applied as well to the I.A.M. as to the U.M.W. (R. 173-174).

The witness for the petitioner, Elizabeth Ann Hamilton, was an employee who was discharged from the respondent company for refusing to do work that was assigned to her and walking off the job and out of the plant without authorization. (R. 259, 328, 329, 410).

The said witness claimed prior to her leaving the job that management discriminatorily had put her on a job which was extremely difficult and that management had neglected to give her gloves for the job and that she cut her hands. Prior to leaving the plant, with full opportunity for medical treatment of the alleged cuts, and after having talked to the plant nurse, and not having exhibited the cuts to her, she left the plant. (R. 259, 328, 329).

In making the complaint before the National Labor Relations Board, her hands were covered with gauze but she did not display the cuts to any official of the said Board. (R. 489).

The witness for the petitioner, Loraine Evans is an employee who was discharged by reason of her inability to get along with her fellow employees. No matter where in the plant the said employee was placed, frictions arose between her and other employees. (R. 73, 338, 343, 392, 393, 395, 445, 446). Prior to the incident leading to her discharge, a notation was made in her file kept in the personnel office, that any further problems relating to her inability to get along with her fellow employees would result in her discharge. (R. 417-418). Further difficulties did arise, and she was discharged. The witness J. C. Hamilton, husband of Elizabeth Ann Hamilton, was on several occasions, observed campaigning during company working hours. (R. 307, 309, 311, 396, 419). He was considered to be a trouble maker by his superiors and frictions arose between him and other employees. (R. 225, 231, 232, 233, 263, 307, 309, 311, 476, 477, 478, 479). He was guilty of rank insubordination of Mr. Mitchell J. Simon, the manager of the plant. (R. 231-233, 476, 477, 478, 479).

Gerald Pipmeier, another witness who the petitioner intended to call, failed to appear at the hearing and evidence was introduced of a letter written by the said Pipmeier to the respondent company relative to his entire satisfaction with the company while he was employed by it. (R. 488).

James A. Juhl, one of the parties active in the UMW movement in the plant, distributed UMW membership cards and was asked by his foreman, Clyde Casey, if he was distributing such cards, Juhl agreed that he was, and Casey demanded that the cards be turned over to him. This took place during company working hours. Juhl returned the executed cards to employees who had executed them in violation of Casey's orders. Nothing appears in the record which would indicate that Casey had anything else in mind but to return them at the end of Juhl's shift.

The respondent company, in the midst of various dissensions due to the rivalry between the I.A.M. and the U.M.W., took all steps that conceivably or reasonably could be required of an organization to maintain a policy of neutrality. The trial examiner believed that the company was sincere in its efforts to pursue a middle-of-the-road policy. (R. 59).

There is nothing in the record according to the testimony of Mr. Simon, the manager of the plant, or any of his responsible managerial employees which would indicate that the employees were restricted in their organizational activities during rest periods and lunch hours. The only testimony which appears in the record is that of J. C. Hamilton, the husband of a discharged employee, and

James Juhl, both strong campaigners for U.M.W. representation, and who did considerable campaigning during working hours, and who were considered to be chronic trouble makers.

II

The Board's Order

The order requires a posting by the respondent company of a notice to all employees, stating that the respondent company will cease and desist from doing certain things which it is alleged constituted unfair labor practices. It is felt by the respondent company that they have done nothing which would constitute unfair labor practices and should not be required to post the notice.

Argument

I

THE BOARD IMPROPERLY FOUND THAT RESPONDENT INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES IN VIOLATION OF SECTION 8 (a) (1) OF THE ACT.

A. Surrender of executed membership cards.

Petitioner argues that the evidence affirmatively establishes that respondent company demanded the surrender of executed U.M.W. authorization cards by employee Juhl. In direct violation of the order, the employee Juhl returned the cards to the persons who executed the same. It is certainly within the power of the company to exer-

cise its managerial right to take any reasonable steps to insure that no employee, during working hours, does anything but work for the company. If the employee Juhl had cards in his possession during working hours, it would seem that a demand for the surrender of the same until he had completed his shift would not be unreasonable. If the employee Juhl had acquired these membership cards in authorized rest periods, during lunch hours, or outside of working hours altogether, it would have been incumbent upon him to have advised Foreman Casey of that fact, but there appears nothing in the record which would indicate that employee Juhl attempted to justify his position in any manner whatever. In the absence of any effort on his part to show justification, or that the cards were executed lawfully outside of working hours, it would appear to be reasonable to assume that he was violating company policy and direct orders against campaigning on company time. If the employee Juhl were selling tickets to a raffle, circulating a petition, unconnected with any type of union activity, conducting himself in any manner which appeared to be violating company policy relative to personal activity on company time, it could not be argued that management acted wrongfully in requiring the employee to turn over the tickets, petition or whatever other instrumentality the employee was using to distract himself and other employees from their work during working hours.

The petitioner is attempting to make capital of this isolated instance of alleged unfair labor practice. If it is an unfair labor practice, it is obviously contrary to the "determined effort on the part of management . . . to main-

tain a policy of neutrality”, as found by the Board. (R. 59). Such an isolated remark cannot be the basis of a charge of unfair labor practices.

In *NLRB vs. Montgomery Ward and Company*, 157 F 2 486, the Court held that where employer’s instructions unequivocally proclaimed right of employees to join, form, or assist the unions and forbade interference with any union activities on behalf of employees, and forbade anti-union discrimination in any form, isolated remarks over a period of fifteen months by some five minor supervisory employees in plant employing 1,600 persons could not be considered as reflecting policy of the employer, so as to constitute an unfair labor practice under this section.

See also *NLRB vs. England Bros., Inc.*, 201 F 2 395, where it was held that mere words of interrogation or perfunctory remarks by employee not threatening or intimidating in themselves, made by an employee without anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism or as a part of espionage upon employees does not amount to an interference with, restraint or coercion on employees in connection with their union activities.

In the present case the Board has reached far, and, it is submitted, fruitlessly, for facts upon which to base a charge, in relying upon the conversations between Foreman Casey and James Juhl.

B. Campaigning during rest periods

The testimony of responsible officials of the respondent company would indicate that no member of the U.M.W. at any time asked any responsible person in management whether or not they could campaign during

rest periods. There is no testimony from any of the witnesses called who represented management that the question of campaigning during rest periods was even mentioned and affirmatively that nothing was said by any responsible managerial individual relative to campaigning during rest periods. Petitioner relies on three employees who are no longer employed by the respondent company, Elizabeth Ann Hamilton, Loraine Evans, and James Juhl, one of the employees having been discharged for wilful disobedience to company's policies and orders, namely, Elizabeth Ann Hamilton, another employee who was discharged by reason of constant, prolonged and habitual inability to get along with her co-workers, namely Loraine Evans, the third employee, James Juhl, who according to the testimony adduced at the hearing, spent considerable company time campaigning for the U.M.W., and generally made himself obnoxious. They rely on a fourth employee, presently employed by the company, the husband of the woman discharged for disobedience of orders, a trouble maker, a person himself guilty of rank insubordination, and one whose testimony is incapable of belief. Contrasted with the testimony of these disgruntled employees, we have the testimony of the plant manager, Mitchell Simon, who has had a great deal of experience in union activities and who was extremely cautious relative to any steps taken or to be taken in connection with an impending labor controversy. Upon contacting his home offices in Detroit, he was advised to take a middle-of-the-path course, not siding with either the I.A.M. or the U.M.W., and not doing anything to interfere with any factional disputes but to leave the controversies to the two unions.

After having received the information from the home office, the manager carefully instructed his foreman and other responsible employees relative to the middle-of-the-road course that the company of necessity would be required to follow, and thereupon posted a notice relative to campaigning during working hours. After having received word from the home office, a delegation of employees contacted Mr. Simon and his position was again reiterated, that of a middle-of-the-road course.

At the outset it was clear in the minds of the top level of management that the path which had to be taken under the law, which has been enunciated in a great number of cases including *NLRB vs Cleveland Cliffs Iron Co.*, 133 F 2 295, was one of strict neutrality.

A substantial portion of the testimony of nearly all of the Board's witnesses, as will more fully appear hereinafter, was not believed by the Trial Examiner. Moreover, the Trial Examiner believed that the company was attempting to implement a policy of neutrality. Yet, for purposes of fact finding regarding the alleged instances of unfair labor practices, much of the testimony of the various witnesses, who were shown to have distorted and stretched the truth to the breaking point, must have been accepted as gospel, while obviously, in view of the findings of fact, the testimony of the manager of the plant and his responsible supervisory personnel was utterly disregarded.

See *Ohio Associated Tel. Co. vs NLRB*, 192 F 2 664. The Court there held that where warnings by employees' supervisors that union affairs should not be discussed on employer's premises were sporadic and were repudiated

by employer and never enforced, there was no unfair labor practice in violation of this chapter.

In *Pittsburgh S.S. Co. vs NLRB*, 180 F 2 731, 340 U.S. 498, it was held that a shipowner who instructed captains and officers that they must maintain strict impartiality and not interfere with union activities as long as activities did not conflict with discipline or proper operation, and who instructed men positively as to their rights through individual letters, was not guilty of an unfair labor practice in failing to communicate to the crew, instructions given to captains.

C. Removal of buttons.

It is clear from the testimony of manager Simon that he was advised by his Detroit office that U.M.W. adherents should be allowed to wear their buttons, as long as they didn't pass them around and otherwise campaign during working hours. It is equally clear that the plant supervisory personnel were instructed relative to these orders from headquarters. The Trial Examiner believed that guidance was obtained from the Detroit office and that the management of the local plant made a determined effort to "maintain a policy of neutrality." (R. 59). The Trial Examiner did not believe that Mr. Simon ever ordered any employee to remove a U.M.W. button. (R. 51).

But in relation to the wearing of U.M.W. buttons, the board found in accordance with these disgruntled employees' testimony, as against the testimony of responsible managerial officials in spite of the fact that much of the testimony of these various employees is obviously either totally false, or grossly mistaken. Neither the manager nor

any responsible supervisory employees of the respondent company testified that any employee was ordered to remove his button, either I.A.M., or U.M.W., although it is clear that all responsible managerial employees advised the employees of the plant that they were not to use the buttons for campaign purposes such as passing the buttons around during working hours or doing any other act which could be considered campaigning during working hours.

D. Respondent's Position in General.

It seems inconceivable, in view of the trial examiner's findings to the effect that there was a "determined effort on the part of the respondent's local management to give effect to its current I.A.M. contract and, at the same time to maintain a policy of neutrality" (R. 59), plus clear cut evidence of manager Simon's instructions from his home office, plus the dissemination of these instructions to employees under him, that the Board could find that violations existed by reason of the demand for the surrender of union membership cards, that an explicit finding could be made that there was an affirmative prohibition against union activity during rest periods and that the same management was ordering employees to remove campaign buttons.

The Trial Examiner made specific finding that the testimony of the Board's witness, James Juhl, was, "erroneous, insofar as it purports to indicate a general prohibition of organizational activity on company property during non-working time." (R. 47).

The Trial Examiner specifically found that the production manager never "ordered Hamilton or any other

employee to remove a U.M.W. button in the plant.” (R. 51).

The Trial Examiner did not believe J. C. Hamilton in relation to his conversations with Mr. Simon. (R. 58).

He did not believe Elizabeth Ann Hamilton’s version of the circumstances under which she departed from the plant, nor did he believe J. C. Hamilton’s version of the same. (R. 70).

He found that Loraine Evans was a trouble maker, “involved in Cross Complaints and controversy with fellow workers”. (R. 73), and of necessity must have disbelieved her testimony.

The Trial Examiner refuted Juhl’s sweeping generalizations that he was instructed to campaign “off the company property, out of the company time”, in favor of Simon’s “genuine effort, to implement the respondent’s policy as he understood it.” (R. 83).

Can it be said, then, that the Board had sufficient evidence to sustain its order in view of the above findings, in view of the obvious distortion of the truth practiced by the Board’s witnesses, most of whom were disgruntled maladjusted misfits.

An analysis of the testimony in the “Transcript of Record,” would indicate that at best the petitioner relies upon a thin thread of vengeful accusations by disgruntled employees, most of whose testimony, at best, is improbable in the face of the excellent employer-employee relations of respondent company prior to the incidents in question, and upon which testimony they are attempting to sustain their burden of proof in order to enforce an unfair order.

The respondent company found itself squarely in the

middle when frictions arose between the I.A.M. and the U.M.W. adherents. If the company by inadvertence or otherwise deviated from the proverbial “middle-of-the-road”, it would find itself in trouble with either the I.A.M., or the U.M.W., depending on the direction of the deviation. However, regardless of the tensions of the moment, the struggles between the unions, the dissensions in the plant, management was burdened with the responsibility of continuing production. In so doing it had the right to exercise its managerial prerogatives. There still existed the relation of employer and employee between the respondent company and its employees. Congress, while safeguarding, through enactment of the laws in question, the right of employees to engage in concerted activities for purpose of collective bargaining or other mutual aid or protection, did not weaken the underlying contractual bonds and loyalties of employer and employee. See *NLRB vs Local Union No. 1229*, 346 U.S. 464.

It would be next to impossible to enforce lawful requirements relative to campaigning during working hours, where such activity was apparent and increasing in intensity, causing dissension in the plant, without disturbing the sensitivities of one side or the other. But it cannot be argued that management did not have the right to make reasonable regulations designed to minimize any interferences with plant efficiency and employees' best capabilities.

See *NLRB vs Rockaway News Supply Co.*, 197 F 2 111, 345 U.S. 71; *NLRB vs Montgomery Ward and Co.*, 157 F 2 486; *NLRB vs Edinburg Citrus Ass'n*, 147 F 2 353.

CONCLUSION

In the light of respondent Company's efforts to follow a truly neutral path, in the absence of more than a thin thread of evidence to connect management with alleged unfair labor practices, and the apparent innocuous nature of the isolated instances, contrary to admitted company policy, it is respectfully urged that the Board's petition be denied.

Respectfully submitted

HOLT, MACOMBER AND GRAHAM
and FRANKLIN B. ORFIELD

By.....

No. 15080

United States
Court of Appeals
for the Ninth Circuit

E. J. STANFILL, as Trustee and ELFRIEDA
MAY, Appellants,

vs.

RALPH B. DEFENBACH, as Trustee,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Eastern
District of Washington, Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court for the Eastern Dis-
trict of Washington, Southern Division

Civil Action No. 1021

SUN LIFE ASSURANCE COMPANY of CAN-
ADA, a corporation, Plaintiff,

vs.

MARY P. WEYEN, individually and as guardian
of Daryl Weyen and Carolyn Weyen, minors,
ELFRIEDA MAY, RALPH B. DEFEN-
BACH as trustee, E. J. STANFILL as trustee
and E. J. STANFILL as executor of the estate
of Robert Francis Weyen, deceased,
Defendants.

COMPLAINT

Plaintiff alleges:

First Count

(Policy 1,447,698)

1. This is a civil action of interpleader arising under the Act of June 25, 1948, c. 646, 62 Stat. 931, 28 USCA § 1335; the Act of June 25, 1948, c. 646, 62 Stat. 936, 28 USCA § 1397; the Act of June 25, 1948, c. 646, 62 Stat. 970, amended May 24, 1949, c. 139, § 117, 63 Stat. 105, 28 USCA § 2361; and Rules 22 and 65 (e) of the Federal Rules of Civil Procedure, as hereinafter more fully appears. The policies of insurance here involved are of amounts of \$500 or more and two or more adverse claimants of diverse citizenship as defined in section 1332 of

title 28 of USCA are claiming or may claim to be entitled thereto.

2. On October 30, 1934, plaintiff issued to Robert Frances Weyen (whose true middle name was Francis) a policy of life insurance number 1,447,698 whereby plaintiff promised to [1*] pay to Elfrieda Weyen as beneficiary the sum of \$2000 upon the death of Robert Frances Weyen from accidental means.

3. On April 16, 1955, Robert Francis Weyen died at Asotin, Washington, as the result of an accident. Said policy was at that time in effect.

4. Mary P. Weyen is the surviving divorced wife of Robert Francis Weyen and is the natural mother and the duly appointed, qualified and acting general guardian of the persons and estates of Daryl Weyen and Carolyn Weyen, surviving minor children of Robert Francis Weyen, under order of the Superior Court of the State of Washington for Asotin County. Mary P. Weyen in her individual and representative capacities claims or may claim an interest in the proceeds of said policy as against all persons except Elfrieda May. She and said minors reside at Clarkston, Washington, and are citizens of the State of Washington.

5. Elfrieda May was formerly named Elfrieda Weyen, is the surviving mother of Robert Francis Weyen and was the original beneficiary of said policy. On October 7, 1954, Robert Francis Weyen

* Page numbers appearing at foot of page of original Transcript of Record.

assigned all his right, title and interest in said policy to Elfrieda May. On October 7, 1954, Robert Francis Weyen and E. J. Stanfill assigned all their right, title and interest in said policy to Elfrieda May. Elfrieda May claims to have paid all or some of the premiums paid on said policy. Elfrieda May claims or may claim an interest in the proceeds of said policy. She resides at Los Angeles, California, and is a citizen of the state of California.

6. On September 23, 1953, Robert Francis Weyen changed the beneficiary of said policy to E. J. Stanfill as trustee under a trust agreement dated September 23, 1953. Said trust agreement [2] has not been revoked of record by either the trustor or trustee. E. J. Stanfill as trustee claims or may claim an interest in the proceeds of said policy. He resides at Enterprise, Oregon, and is a citizen of the state of Oregon.

7. E. J. Stanfill is the duly appointed, qualified and acting executor under the will of Robert Francis Weyen in the probate thereof now pending in the Probate Court of the State of Idaho for Lewis and Clark County. E. J. Stanfill as executor of said estate claims or may claim some interest in the proceeds of said policy. He resides at Enterprise, Oregon, and is a citizen of the state of Oregon.

8. The claims above alleged are conflicting and adverse and by reason thereof plaintiff is or may be exposed to multiple liability or multiple vexation by reason of one liability. By reason thereof plaintiff is in great doubt as to which defendant or

defendants are entitled to be paid the proceeds of said policy.

9. The amount due under said policy to the person or persons entitled to the proceeds thereof is \$1,831.20. The computation of said amount appears in exhibit A of this complaint. With the filing of this complaint plaintiff has paid said amount into the registry of this court there to abide the judgment of the court.

10. The sum of \$37 is reasonable to be allowed to plaintiff's attorneys for their services with respect to this count.

Second Count

(Policies 1,710,519, 1,755,413, 1,852,251, 1,861,700, 1,861,701.)

1. With respect to the five policies under this count [3] plaintiff repeats the allegations of paragraph 1 of the first count.

2. On June 27, 1944, plaintiff issued to Robert Francis Weyen a policy of life insurance No. 1,710,519 whereby plaintiff promised to pay to Mary Phyllis Weyen as beneficiary the sum of \$2,000 upon the death of Robert Francis Weyen from accidental means. On July 11, 1946, plaintiff issued to Robert F. Weyen (whose middle name was Francis) a policy of life insurance No. 1,755,413 whereby plaintiff promised to pay to Mary P. Weyen (whose middle name was Phyllis) as beneficiary the sum of \$2,000 upon the death of Robert Francis Weyen from accidental means. On June 5, 1950, plaintiff issued to Robert F. Weyen a policy of life insur-

ance No. 1,852,251 whereby plaintiff promised to pay to Mary P. Weyen as beneficiary the sum of \$4,000 upon the death of Robert F. Weyen from accidental means. On October 25, 1950, plaintiff issued to Robert F. Weyen a policy of life insurance No. 1,861,700 whereby plaintiff promised to pay to Mary P. Weyen as beneficiary the sum of \$20,000 upon the death of Robert F. Weyen from accidental means. On October 25, 1950, plaintiff issued to Robert F. Weyen a policy of life insurance No. 1,861,701 whereby plaintiff promised to pay to Mary P. Weyen as beneficiary the sum of \$20,000 upon the death of Robert F. Weyen from accidental means.

3. With respect to the five policies under this count plaintiff repeats the allegations of paragraph 3 of the first count.

4. Mary P. Weyen is the surviving divorced wife of Robert Francis Weyen and is the natural mother and the duly appointed, qualified and acting general guardian of the persons and estates of Daryl Weyen and Carolyn Weyen, surviving minor [4] children of Robert Francis Weyen, under order of the Superior Court of the State of Washington for Asotin County. Mary P. Weyen in her individual and representative capacities claims or may claim an interest in the proceeds of said policies. She and said minors reside at Clarkston, Washington, and are citizens of the state of Washington.

5. Elfrieda May is the surviving mother of Robert Francis Weyen. She claims to have paid all or

some of the premiums paid on said policies and claims or may claim an interest in the proceeds of said policies. She resides at Los Angeles, California, and is a citizen of the state of California.

6. With respect to the five policies under this count plaintiff repeats the allegations of paragraph 6 of the first count.

7. On November 24, 1954, Robert F. Weyen assigned for value said policies to Ralph B. Defenbach as trustee for the benefit of creditors under a trust agreement dated November 16, 1954, and transmitted said assignment to plaintiff with a letter stating "The intention of this Assignment For Value is to change the beneficiary on all the policies to read as follows: 'Ralph B. Defenbach, Trustee, under that certain Assignment to Trustee for Benefit of Creditors, dated 16 November 1954'." On the same date an identical assignment was executed by Robert F. Weyen and E. J. Stanfill. Ralph B. Defenbach as trustee claims or may claim an interest in the proceeds of said policies. He resides at Lewiston, Idaho, and is a citizen of the state of Idaho.

8. With respect to the five policies under this count plaintiff repeats the allegations of paragraph 7 of the first count.

9. With respect to the five policies under this count [5] plaintiff repeats the allegations of paragraph 8 of the first count.

10. The amounts due under said policies to the person or persons entitled to the proceeds thereof are:

Policy No. 1,710,519.....	\$ 1,606.58
Policy No. 1,755,413.....	1,702.49
Policy No. 1,852,251.....	3,683.15
Policy No. 1,861,700.....	19,603.42
Policy No. 1,861,701.....	19,603.42
<hr/>	
Total.....	\$46,199.06

The computations of said amounts appear in exhibit A of this complaint. With the filing of this complaint plaintiff has paid said amounts into the registry of this court there to abide the judgment of the court.

11. The sum of \$924 is reasonable to be allowed to plaintiff's attorneys for their services with respect to this count.

Third Count

(Policy 1,919,863.)

1. Plaintiff repeats the allegations of paragraph 1 of the first count.

2. On January 5, 1953, plaintiff issued to Robert Francis Weyen a policy of life insurance No. 1,919,863 whereby plaintiff promised to pay to his executors or administrators as beneficiary the sum of \$6,000 upon his death from accidental means.

3. Plaintiff repeats the allegations of paragraph 3 of the first count.

4. With respect to the policy under this count plaintiff repeats the allegations of paragraph 4 of the second count. [6]

5. With respect to the policy under this count

plaintiff repeats the allegations of paragraph 5 of the second count.

6. Plaintiff repeats the allegations of paragraph 6 of the first count.

7. With respect to the policy under this count plaintiff repeats the allegations of paragraph 7 of the second count.

8. Plaintiff repeats the allegations of paragraph 7 of the first count.

9. Plaintiff repeats the allegations of paragraph 8 of the first count.

10. The amount due under said policy to the person or persons entitled to the proceeds thereof is \$5,746.87. The computation of said amount appears in exhibit A of this complaint. With the filing of this complaint plaintiff has paid said amount into the registry of this court there to abide the judgment of the court.

11. The sum of \$115 is reasonable to be allowed to plaintiff's attorneys for their services with respect to this count.

Fourth Count

(Policy 1,952,847)

1. Plaintiff repeats the allegations of paragraph 1 of the first count.

2. On December 16, 1953, plaintiff issued to Robert Francis Weyen a policy of life insurance No. 1,952,847 whereby plaintiff promised to pay to "E. J. Stanfill, as trustee under Trust Agreement dated the nineteenth day of October 1953" as bene-

ficiary the sum of \$10,000 upon the death of Robert Francis Weyen from accidental means. The date October 19, 1953, appearing in said designation of beneficiary was in error and the date [7] of the Trust Agreement there referred to was in fact September 23, 1953.

3. Plaintiff repeats the allegations of paragraph 3 of the first count.

4. With respect to the policy under this count plaintiff repeats the allegations of paragraph 4 of the second count.

5. With respect to the policy under this count plaintiff repeats the allegations of paragraph 5 of the second count.

6. With respect to the policy under this count plaintiff repeats the allegations of paragraph 7 of the second count.

7. Plaintiff repeats the allegations of paragraph 7 of the first count.

8. Plaintiff repeats the allegations of paragraph 8 of the first count.

9. The amount due under said policy to the person or persons entitled to the proceeds thereof is \$9,767.30. The computation of said amount appears in exhibit A of this complaint. With the filing of this complaint plaintiff has paid said amount into the registry of the court there to abide the judgment of the court.

10. The sum of \$195 is reasonable to be allowed to plaintiff's attorneys for their services with respect to this count.

Wherefore plaintiff demands that the court adjudge:

1. That until the further order of the court each of the defendants be restrained from instituting any action against plaintiff for recovery of the amounts of said policies or any part thereof and that upon final judgment herein such restraint be made a permanent injunction. [8]

2. That the defendants be required to interplead and settle among themselves their rights to the money due under said policies, that plaintiff be discharged from all liability in the premises except to the person or persons whom the court shall adjudge entitled to the amounts of said policies, and that the amounts paid into the registry of this court upon the filing of the complaint herein be adjudged full discharge by the plaintiff of all its liabilities under said policies.

3. That plaintiff recover its costs and its attorney's fee herein in a reasonable amount determined by the court and made a charge against the funds in court or the defendants as the court shall determine.

4. That the court enter such other orders and judgment as are necessary and proper in the premises.

Spokane, Washington, July 7, 1955.

/s/ J. W. GREENOUGH,

/s/ GRAVES, KIZER, GREENOUGH &
GAISER,

Attorneys for Plaintiff

[9]

EXHIBIT "A"

**DETAILED STATEMENT OF AMOUNTS PAYABLE UNDER
THE POLICIES AS THEY APPEAR ON CHEQUE No.
273453 ATTACHED HERETO.**

RE: THE LATE ROBERT F. WEYEN

Policy No. 1,447,698—

Sum Assured.....	\$ 1,000.00	218
Double Indemnity Accident Benefit.....	1,000.00	218
Paid up Additions.....	232.00	218
Loan with interest to the date of death.....	\$ 400.80	126A/3/32
To Balance.....	1,831.20	
	<hr/>	
	\$ 2,232.00	\$ 2,232.00
	<hr/>	<hr/>

Policy No. 1,710,519—

Sum Assured.....	\$ 1,000.00	218
Double Indemnity Accident Benefit.....	1,000.00	218
Dividends on Deposit.....	61.47	122/48
Loan with interest to the date of death.....	\$ 454.89	126A/3/32
To Balance.....	1,606.58	
	<hr/>	
	\$ 2,061.47	\$ 2,061.47
	<hr/>	<hr/>

Policy No. 1,755,413—

Sum Assured.....	\$ 1,000.00	218
Double Indemnity Accident Benefit.....	1,000.00	218
Dividends on Deposit.....	48.05	122/48
Loan with interest to the date of death.....	\$ 345.56	126A/3/32
To Balance.....	1,702.49	
	<hr/>	
	\$ 2,048.05	\$ 2,048.05
	<hr/>	<hr/>

Policy No. 1,852,251—

Sum Assured.....	\$ 2,000.00	218
Accidental Death Benefit.....	2,000.00	218
Dividends on Deposit.....	33.35	122/48
Advance with interest to the date of death.....\$	350.20	
To Balance.....\$	3,683.15	
	<u>\$ 4,033.35</u>	<u>\$ 4,033.35</u>

/s/ C. H. HOPKINS

Policy No. 1,861,700—

Sum Assured.....	\$10,000.00	218
Accidental Death Benefit.....	10,000.00	218
Dividends on Deposit.....	152.45	122/48
Advance with interest to the date of death.....\$	549.03	126A/3/32
To Balance.....	19,603.42	
	<u>\$20,152.45</u>	<u>\$20,152.45</u>

Policy No. 1,861,701—

Sum Assured.....	\$10,000.00	218
Accidental Death Benefit.....	10,000.00	218
Dividends on Deposit.....	152.45	122/48
Advance with interest to the date of death.....\$	549.03	126A/3/32
To Balance.....	19,603.42	
	<u>\$20,152.45</u>	<u>\$20,152.45</u>

Policy No. 1,919,863—

Sum Assured.....	\$ 3,000.00	218
Accidental Death Benefit.....	3,000.00	218
Dividends on Deposit.....	15.84	122/48
Advance with interest to the date of death.....\$	268.97	126A/3/32
To Balance.....\$	5,746.87	
	<u>\$ 6,015.84</u>	<u>\$ 6,015.84</u>

Policy No. 1,952,847—

Sum Assured.....	\$ 5,000.00	218
Accidental Death Benefit.....	5,000.00	218
Advance with interest to the date of death.....\$	232.70	126A/3/32
To Balance.....\$	9,767.30	
	<u>\$10,000.00</u>	<u>\$10,000.00</u>

June 30, 1955 /s/ C. H. HOPKINS

[Endorsed]: Filed July 8, 1955.

[Title of District Court and Cause.]

ANSWER AND CROSS-CLAIM

Defendant, E. J. Stanfill, as Trustee, as Guardian of the Estates of Daryl Weyen and Carolyn Weyen and as Executor, admits all of the averments and allegations in Counts 1, 2, 3 and 4 of Plaintiff's Complaint except as follows:

1. With reference to paragraphs 4 in each Count, Defendant admits that Mary P. Weyen is the surviving divorced wife of Robert Francis Weyen and the natural mother and guardian of the persons of the minor children, Daryl Weyen and Carolyn Weyen, and that she and said minors reside at Clarkston, Washington, and are citizens of the State of Washington. Defendant denies that Mary P. Weyen is guardian of the estates of said minor children or that she, in her individual or representative capacity, claims any interest in the proceeds of any of said policies. Mary P. Weyen withdrew

as Guardian of the estates of said minors on July 19, 1955. [13]

2. With reference to paragraph 7 of the Second, Third and Fourth Counts, Defendant, upon information and belief, denies each and every affirmative matter, thing or fact therein alleged and the whole thereof.

Cross-Claim Against: Elfrieda May, Ralph B. Defenbach as Trustee, Mary P. Weyen as an individual and as Guardian of the persons of Daryl Weyen and Carolyn Weyen:

Cross-Claimant alleges:

I.

That Cross-Claimant, E. J. Stanfill, is the duly appointed, qualified and acting guardian of the estates of Daryl Weyen and Carolyn Weyen, minors, under and by virtue of Letters of Guardianship issued out of Superior Court of Asotin County, State of Washington, in Cause No. 7807, on the 19th day of July, 1955, a true copy of which Letters of Guardianship are attached hereto, marked Exhibit "A", and incorporated herein by reference.

II.

That Cross-Claimant, E. J. Stanfill, is the duly designated and acting Trustee for the benefit of the minors, Daryl Weyen and Carolyn Weyen, under and by virtue of one certain Trust Agreement, dated September 23, 1953, filed for record and recorded in the office of Auditor for Asotin County, State of Washington, on June 24, 1954 and re-

corded in Book "E" of Miscellaneous Records of said County at page 407, a copy of which Trust Agreement is annexed hereto, marked Exhibit "B" and incorporated herein by reference; that said Agreement has never been revoked of record or at all by either Trustee or Trustor and is still in full force and effect; that all parties hereto had actual or constructive notice thereof prior to November 16, 1954.

III.

That the Trustor, Robert Francis Weyen, subsequent to the execution of the Trust Agreement and in accordance with the terms thereof, caused E. J. Stanfill to be designated as beneficiary of each of the several policies mentioned in Plaintiff's Complaint and delivered said policies to the said [14] E. J. Stanfill as Trustee; that the minor children, Daryl Weyen and Carolyn Weyen thereupon and at that time, acquired a vested interest in and to said policies and the proceeds of death payments thereon; that said vested interest was irrevocable under the terms, conditions and provisions of the Trust Agreement.

IV.

That the subsequent pretended Assignment of Policy No. 1447698 to Elfrieda May and the subsequent pretended Assignment of the remaining policies to Ralph B. Defenbach as Trustee for the benefit of creditors, was and is void as without consideration; as a violation of the Trust Agreement of September 23, 1953 of which Ralph B. Defenbach and Elfrieda May had actual or con-

structive notice, and as an attempt to deprive the minor children, Daryl Weyen and Carolyn Weyen, of vested interests without their consent.

V.

That this Cross-Claimant, in his capacity as Trustee, has never released and could not lawfully release the vested interests of the minor children in and to said policies or any of them.

VI.

That the Trustor, Robert Francis Weyen, had no lawful authority to change the beneficiary of, or assign, said policies in excess of pledging same or exercising the loan privileges; that his attempt to do so was void as a violation of the irrevocable Trust Agreement and an effort to deprive minor children of a vested interest in the policies created by said Trust Agreement.

VII.

That the pretended Assignments of said policies and attempts to change beneficiary thereof to Alfrieda May and Ralph B. Defenbach as Trustee, respectively, was and is inequitable and unconscionable in that if allowed to stand, the action would deprive two minor children of their sole means of support and livelihood, that said children would be obliged to become objects of charity and thus defeat the plans, intent and purpose of decedent, Robert Francis [15] Weyen, as evidenced by Trust Agreement of December 23, 1953 as sup-

ported by the expression in his Last Will and Testament, a copy of which is annexed hereto and marked Exhibit "C", wherein decedent expressly made no provision for the children because of a concurrently executed Trust Agreement (Ex. "B").

VIII.

That the interests of Elfrieda May in and to said policies are junior and inferior to the interests of the minors, Daryl Weyen and Carolyn Weyen.

IX.

That the interests of Ralph B. Defenbach as Trustee, if any, are junior and inferior to the interests of the minors, Daryl Weyen and Carolyn Weyen.

X.

That E. J. Stanfill as Executor is a necessary and proper party to the within action and appears as such; that your Executor is advised and believes and therefore alleges that his rights as executor are junior and inferior to the interests of the minor children but that, in the event the Court should hold for any reason that the Trustee or Guardian for the minors are not entitled to the proceeds of said policies, then your Executor claims a superior right to said proceeds as against Ralph B. Defenbach as Trustee, for the reason and on the ground that the purported Assignment for the benefit of creditors was an operating agreement only and ceased and determined upon the death of Robert Francis Weyen.

Wherefore, Cross-Claimant demands that the Court adjudge:

I.

That the interests of Elfrieda May, Ralph B. Defenbach as Trustee, Mary P. Weyen as an individual and as guardian of the persons of [16] the minors, Daryl Weyen and Carolyn Weyen, and E. J. Stanfill as Executor, in and to the proceeds of the several policies mentioned herein, be held for naught and that said persons be forever restrained and enjoined from asserting or claiming any interest in and to the proceeds of any of said policies of insurance or any portion thereof.

II.

That this Cross-Claimant as Trustee (or in the alternative as Guardian) recover and be awarded all the net proceeds of said policies as deposited in this Court.

III.

That the rights of Executor be determined.

IV.

That the Court enter such other Orders and Judgment as are necessary and proper in the premises.

Dated this 11th day of August, 1955.

/s/ S. DEAN ARNOLD,

Attorney for Defendant E. J. Stanfill as Guardian,
as Trustee and as Executor.

[17]

EXHIBIT "A"

(Copy)

In the Superior Court of the State of Washington
for Asotin County, (in Probate) No. 7807.
In the matter of the guardianship of Daryl
Weyen and Carolyn Weyen, Minors.

LETTERS OF GUARDIANSHIP

Whereas, on the 19th day of July, 1955, E. J. Stanfill was, by order of this Court duly made and entered on said date, appointed Guardian of the estates of Daryl Weyen and Carolyn Weyen, Minors, and whereas the said Guardian has filed his bond as such in the office of the Clerk of this Court, and the same has been approved; now therefore,

Know All Men by These Presents, That E. J. Stanfill is appointed guardian of estates of Daryl Weyen and Carolyn Weyen, Minors, as aforesaid.

Witness, The Hon. Thomas G. Jordan, Judge of said Court, and the Seal thereof, this 19th day of July, 1955.

[Seal] /s/ BEN F. TAPLIN,
Clerk of Superior Court.

State of Washington,
County of Asotin—ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution and Laws of the State of Washington, and that I

will faithfully perform the duties of my office as guardian of the estates of Daryl Weyen and Carolyn Weyen, Minors.

/s/ E. J. STANFILL

Subscribed and sworn to before me this 19th day of July, 1955.

[Seal] /s/ S. DEAN ARNOLD,
Notary Public in and for the State of Washington,
residing at Clarkston. [18]

Received and filed July 19, 1955. /s/ Ben F. Taplin, Clerk.

EXHIBIT "B"

TRUST AGREEMENT

(Copy)

This Trust Agreement, identified as Trust No. 1 made this 23rd day of September, 1953, by and between Robert F. Weyen of Clarkston, Asotin County, Washington, hereinafter called the Donor, and E. J. Stanfill, Attorney at Law, Clarkston, Washington, hereinafter called the Trustee,

Witnesseth:

Whereas, the donor has designated the Trustee as beneficiary in the insurance policies described in the schedule hereto attached, made a part hereof, and entitled Schedule of Policies of the Robert F. Weyen Trust, and has delivered such policies to the

Trustee in order that it may, as such beneficiary, collect the proceeds of such policies; and

Whereas, the donor may later designate Trustee as like beneficiary in additional insurance policies,

Now, Therefore, for and in consideration of One Dollar (\$1.00) paid by each of the parties to the other, and in further consideration of the covenants herein contained of the parties hereto, it is hereby agreed that the Trustee shall hold and administer the said insurance policies and the proceeds thereof and all the other property described in said schedule, and all additional insurance policies, that may, from time to time, be added to this Trust, in trust for the uses and purposes and upon the terms and conditions hereinafter set forth.

1. This trust shall continue for a period of fifteen years (15) from date hereof.

2. Upon the death of the donor during the trust term the Trustee shall collect all sums due under the policies subject to the terms hereof.

3. After the death of the donor during the trust term the trustee shall hold and dispose of the income and principal of the trust as follows: [19]

- a. All proceeds of said policy shall be held by the trustee and be used by the trustee for the support, education and maintenance of Daryl Weyen and Carolyn Weyen, children of the donor.

- b. The trustee shall pay over to the above named children as each reaches the age of Twenty One (21) one half each of the principal of the Trust Fund.

4. All proceeds of said policies, inclusive of all

rights to take and receive payment of cash, surrender or loan payments and all dividends or distributions payable either to the insured or the beneficiary, shall be payable and be paid to the Trustee, and no insurance company issuing any such policies, or making any such payments shall be responsible for or be required to look to the proper discharge of the trust hereof or the application of such payments by the Trustee, and with the absolute right vested in the Trustee to pledge any such policy as collateral, surrender the same either for cash of paid-up insurance value or avail itself of any option granted in any such policy to the insured and his assigns, without the signature or assent of the donor.

5. The Trustee shall have the right and power, so far as the same exist under the terms of said policies of life insurance, to agree and contract with the insurance company issuing such policies to provide that any amount payable thereunder as a principal payment thereunder shall be paid by such insurance company in installments, upon such basis of annuity interest plan or installment payments as may be available under the terms of such policy or policies, such payments to be received by the Trustee and by it distributed to the beneficiaries hereunder as hereinafter provided.

6. In the event that the trust shall terminate during the life of the donor, the Trustee shall thereupon assign, transfer and deliver the trust property to the donor. [20]

7. The donor specifically reserves the right, dur-

ing the term of this trust, to pledge any of such policies as collateral or to exercise the loan rights as provided in said policies, and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the Trustee named herein shall not be required to join in the application for said loans.

In Witness Whereof the parties hereto have hereunto set their hands and seals this 23rd day of September, 1953.

/s/ ROBERT F. WEYEN

/s/ E. J. STANFILL

State of Washington,
County of Asotin—ss.

On this 23rd day of September, 1953 personally appeared before me Robert F. Weyen and E. J. Stanfill, to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 23rd day of September, 1953.

.....

Notary Public in and for the State of Washington,
residing at Clarkston therein.

(Recorded June 24, 1954 in Book "E" of Miscellaneous at page 407, records of Asotin County, State of Washington, office of County Auditor) [21]

Schedule of Insurance Policies of Robert F. Weyen
Trust

- A. Life Insurance Policies,
Sun Life Assurance Co. No. 1755413
Sun Life Assurance Co. No. 1710519
Sun Life Assurance Co. No. 1447698
Sun Life Assurance Co. No. 1852251
Sun Life Assurance Co. No. 1861700
Sun Life Assurance Co. No. 191865
Sun Life Assurance Co. No. 1861701
- B. Life Insurance Policies,
The Macabees Insurance Co. No. 1937383
The Macabees Insurance Co. No. 1845025
- C. Life Insurance Policy,
The Equitable Life
Insurance Company No. GN 12,179,801 [22]

EXHIBIT "C"

LAST WILL AND TESTAMENT

(Copy)

I, Robert F. Weyen, over the age of 21 years, a resident of the County of Asotin, State of Washington, being of sound and disposing mind and memory and not acting under menace, duress, fraud or undue influence of any person whomsoever, do make, publish and declare this to be my Last Will and Testament, and I do hereby expressly revoke all other wills, codicils to wills and testamentary writings heretofore made by me.

First: I direct that my executor, hereinafter named, pay and discharge all my just debts and funeral and testamentary expenses.

Second: I make no provision for my children, namely, Daryl Weyen and Carolyn Weyen, because I have heretofore provided for them through Insurance Policies on my life; however, should said policies lapse or become null and void I hereby give, devise and bequeath to my said children the sum of \$10,000.00 share and share alike.

Third: All the rest, residue and remainder of my property, real, personal and mixed, at whatever time acquired by me and wheresoever situated, I give, devise and bequeath to Emilie Mullins.

Fourth: I hereby nominate and appoint E. J. Stanfill, Attorney at Law, Clarkston, Washington, executor of this my Last Will and Testament, to act without bond and without the intervention of the Court.

Fifth: I hereby appoint E. J. Stanfill, Attorney at Law, Clarkston, Washington, the guardian of the estate that my above named children inherit from me and of all property that they become entitled to by reason of my death.

In Witness Whereof, I have hereunto set my hand and seal this 23rd day of September, 1953.

/s/ ROBERT F. WEYEN

The foregoing instrument, consisting of this page only, was on the 23rd day of September, 1953, at

Clarkston, Washington, signed, sealed and published by Robert F. Weyen as and declared to be his Last Will and Testament, in the presence of each of us, who at his request, and in his presence and in the presence of each other, have subscribed our names as witnesses thereto.

/s/ JOAN VOROUS

Residing at Clarkston,
Washington

/s/ E. J. STANFILL

Residing at Clarkston,
Washington [23]

[Endorsed]: Filed Aug. 15, 1955.

[Title of District Court and Cause.]

ANSWER

Mary P. Weyen, as an individual and as guardian of the persons of Daryl Weyen and Carolyn Weyen, appears herein and disclaims any interest in and to the proceeds of the policies mentioned in Plaintiff's Complaint as an individual or as guardian of the persons of the minors, Daryl Weyen and Carolyn Weyen and joins in the prayer of the Answer and Cross-Claim of E. J. Stanfill as Trustee.

Dated this 11th day of August, 1955.

/s/ S. DEAN ARNOLD,

Attorney for Mary P. Weyen as an individual and
as guardian of the persons of the minors, Daryl
Weyen and Carolyn Weyen. [24]

[Endorsed]: Filed Aug. 15, 1955.

[Title of District Court and Cause.]

ANSWER

Comes now Ralph B. Defenbach as trustee, and
in answer to plaintiff's complaint admits, denies
and alleges as follows:

Answer to First Count

(Policy 1,447,698)

I.

The defendant admits the allegations contained in
Paragraphs 1, 2, 3, 4, 7, 8 and 9 of plaintiff's first
count.

II.

In answer to Paragraph 5, the defendant admits
that Elfrieda May was formerly Elfrieda Weyen
and is the surviving mother of Robert Francis
Weyen, and was the original beneficiary on said
policy, and now resides in Los Angeles, California.
That the defendant is without knowledge or infor-
mation sufficient to form a belief as to the truth of
all of the other allegations contained in Paragraph

5 and therefore, on information and belief, denies the same.

III.

In answer to Paragraph 6, this defendant is without knowledge or [25] information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6, and therefore upon information and belief denies the same, excepting that this defendant admits that E. J. Stanfill resides at Enterprise, Oregon, and is a citizen of the State of Oregon.

IV.

That this defendant is without information or knowledge sufficient to form a belief as to what is a reasonable sum to be allowed plaintiff's attorneys for their services with respect to Count One, and therefore denies the same.

Answer to Second Count

(Policies 1,710,519 - 1,755,413 - 1,852,251 - 1,861,700 - 1,861,701)

I.

The defendant admits the allegations of Paragraphs 1, 2, 3, 4, 5, 7, 8, 9, and 10 of plaintiff's second count.

II.

In answer to Paragraph 6 this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6, and therefore, upon information and belief, denies the same, excepting that this defendant admits that E. J. Stanfill resides at Enter-

prise, Oregon, and is a citizen of the State of Oregon.

III.

That this defendant is without information or knowledge sufficient to form a belief as to what is a reasonable sum to be allowed plaintiff's attorneys for their services with respect to Count Two and therefore denies the same.

Answer to Third Count

(Policy 1,919,863)

I.

The defendant admits the allegations contained in Paragraphs 1, 2, 3, 4, 5, 7, 8, 9 and 10 of plaintiff's Third Count.

II.

In answer to Paragraph 6, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations [26] contained in Paragraph 6, and therefore, on information and belief, denies the same, excepting that this defendant admits that E. J. Stanfill resides at Enterprise, Oregon, and is a citizen of the State of Oregon.

III.

That this defendant is without information or knowledge sufficient to form a belief as to what is a reasonable sum to be allowed plaintiff's attorneys for their services with respect to Count Three, and therefore denies the same.

Answer to Fourth Count
(Policy 1,952,847)

I.

Defendant admits the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of plaintiff's Fourth Count.

II.

That this defendant is without information or knowledge sufficient to form a belief as to what is a reasonable sum to be allowed plaintiff's attorneys for their services with respect to Count Four, and therefore denies the same.

Affirmative Defense

Comes now Ralph B. Defenbach as trustee, and for an affirmative defense alleges as follows:

I.

That on or about the 16th day of November, 1954, at Lewiston, Idaho, Robert F. Weyen (whose middle name is Francis) entered into an assignment to trustee for benefit of creditors, a copy of which assignment is attached hereto, incorporated herein, made a part hereof, and marked Exhibit "A", and which assignment by Paragraph IX thereof made Ralph B. Defenbach, as trustee for his creditors, the beneficiary of the following numbered policies which are involved in this interpleader action, to-wit: Sun Life Assurance Company of Canada policies No. 1,710,519, 1,755,413, 1,852,251, 1,861,700 and 1,861,701; and that immedi-

ately thereafter the necessary [27] documents were prepared and forwarded to the plaintiff herein making Ralph B. Defenbach, as trustee, beneficiary under all of said policies, and that said change of beneficiary was attached to said policies by the home office of said insurance company, and that when said policies were returned to Lewiston, Idaho, they were delivered to Ralph B. Defenbach, as trustee, and were held by him under the terms of said assignment to trustee for the benefit of creditors until they were delivered to the plaintiff immediately succeeding the accident which resulted in the death of Robert Francis Weyen.

II.

That pursuant to the terms of said assignment to trustee for benefit of creditors, the said Ralph B. Defenbach immediately entered into his duties as trustee and continued to manage the affairs of said trust at all times from November 16, 1954 to and including the time of the filing of this Answer; that said assignment to trustee for benefit of creditors was never altered, amended or revoked during the lifetime of Robert Francis Weyen or thereafter, and is still in full force and effect and is still being managed and operated by the defendant Ralph B. Defenbach as trustee.

III.

That the change of beneficiary by Robert Francis Weyen to Ralph B. Defenbach, as trustee, entitled the said Ralph B. Defenbach to the entire pro-

ceeds of the above numbered policies, and that said Ralph B. Defenbach, as trustee, is now and at all times since the death of the said Robert Francis Weyen entitled to all of the proceeds due under all of said policies.

Wherefore, the defendant demands that the Court adjudge:

1. That Ralph B. Defenbach, as trustee, is entitled to all of the proceeds of Sun Life Assurance Company of Canada policies No. 1,710,519, 1,755,413, 1,852,251, 1,861,700 and 1,861,701, which proceeds total the sum of \$61,713.23, and that judgment be granted in favor of the said Ralph B. Defenbach, as Trustee, awarding unto him all of the proceeds of said policies, and that said restraining order issued on July 15, 1955, in said cause be dissolved and declared of no further force and effect insofar as the said Ralph B. Defenbach, as trustee, is concerned. [28]

2. That the defendant have and recover his costs and disbursements in said action.

3. That the Court enter such other orders and judgments as are necessary and proper in the premises.

/s/ PAUL C. KEETON

R. MAX ETTER and ELLSWORTH

I. CONNELLY

/s/ By R. MAX ETTER

[29]

EXHIBIT "A"

ASSIGNMENT TO TRUSTEE FOR BENEFIT
OF CREDITORS

This indenture, made on this 16th day of November, 1954, by and between Robert F. Weyen, Party of the First Part, of Lewiston, Idaho, and Ralph B. Defenbach, Party of the Second Part and hereinafter referred to as Trustee; and the persons listed in Exhibits A and B, hereinafter referred to as Parties of the Third Part;

Witnesseth: That,

Whereas, the Party of the First Part is indebted to many persons on both open accounts and secured claims, and in addition thereto, now has tax liens filed against his property and income by the Collector of Internal Revenue, Boise, Idaho, and the Employment Security Agency, Boise, Idaho, and he is at the present time unable to pay in full said obligations, but is willing to convey all of his property and future income, along with other security hereinafter referred to, for the benefit of his creditors, with preferences and priorities as are hereinafter set out;

Now, Therefore, the Party of the First Part, in consideration of the premises and the covenants and assignments hereinafter contained, agrees with Second Party and Third Parties as follows:

I.

That this assignment shall become effective on the 16th day of November, 1954, and shall remain in effect until terminated as hereinafter provided.

II.

The Party of the First Part transfers and hereby assigns to the Party of the Second Part all moneys and/or credits which shall hereafter [30] become due him on account of his logging operations from the Lorenz Lumber Company at Spalding, Idaho, and the J. Herbert Bate Company at Wallowa, Oregon, or either of them, and also any other person, firm or corporation; and Party of the First Part further assigns, transfers and sets over unto Party of the Second Part any moneys which are now due and/or which shall hereafter become due while this assignment is in effect from the sale of any of the timber assets of Party of the First Part, which are listed in Exhibit C, which is annexed hereto.

III.

The Party of the First Part agrees that Party of the Second Part may cause a copy of this assignment to be recorded in any county or counties in which timber owned wholly or in part by the Party of the First Part is located and the same shall constitute a first lien upon said timber and should said timber be sold or transferred by Party of the First Part, the Party of the Second Part shall be entitled to all of the proceeds of said sale, which shall be applied by said Party of the Second Part as hereinafter provided.

Nothing herein shall be construed to prohibit Party of the First Part from logging said timber now owned by him or any timber hereafter acquired, so long as said logs shall be delivered to a

mill or mills from which said Party of the Second Part receives all moneys due to Party of the First Part for logging operations hereinabove referred to.

IV.

The Party of the First Part agrees that this assignment shall cover any timber hereafter acquired by Party of the First Part until such time as said assignment is terminated as hereinafter provided.

V.

All moneys due at the time of the execution of this assignment and to become due hereafter from any logging operations of the Party of the First Part shall be paid directly to the Trustee for disposition as is hereinafter provided. Party of the Second Part shall keep proper accounts of all transactions taking place under the terms of this assignment and shall meet with the Creditors Committee herein provided for at such time or times as may be necessary and convenient for the parties. The compensation of Second Party for his services rendered hereunder shall be fixed by the Creditors Committee and shall be paid once a month during the time that this assignment is in full force and effect.

VI.

The parties agreeing to this assignment recognize that prior hereto Party of the First Part has made an assignment of his income at the rate of \$2.00 per thousand feet of logs which are delivered to the Lorenz Lumber Mill at Spalding, Idaho, and

J. Herbert Bate Lumber Company, Troy and Wallowa, Oregon, to the Nez Perce Tractor and Equipment Company, Lewiston, Idaho, which moneys are applied in payment of purchase money liens of said Nez Perce Tractor and Equipment Company against Caterpillar Tractors used by Party of the First Part in his logging operations. The parties hereto agree that this assignment shall in no way affect the payments now or hereafter to be made directly by the Lorenz Lumber Company or the J. Herbert Bate Lumber Company to Nez Perce Tractor & Equipment Company at the rate of \$2.00 per thousand feet of logs as the same are delivered by Party of the First Part.

VII.

Upon receipt, Party of the Second Part, out of the moneys and credits hereby assigned, shall from time to time make disbursement in the following order, [32] subject to such changes as may be deemed necessary from time to time by the Creditors Committee:

A. Payment to labor and haulers and loaders from and after November 1, 1954, and current payroll taxes commencing October 1, 1954, and workmen's compensation premiums earned after November 1, 1954.

B. U. S. Government, in payment of tax lien and sums due on Second Quarter 1954 Withholding and Social Security taxes at the rate of \$1,290.17 per month, commencing one month from date hereof;

C. Current operating bills, including rental of equipment, fuel, necessary logging supplies and repairs of equipment;

D. Fees of Party of Second Part, Trustee under this assignment, and expenses of administration of the Trust.

E. Employment Security Agency, Boise, Idaho, payment of lien for unemployment compensation at the rate of \$100.00 per month, commencing one month from the date hereof;

F. Living expenses for Party of the First Part at the rate of \$500.00 per month, commencing one month after date hereof;

G. C.I.T. Corporation, First Security Bank of Idaho, N.A., Lewiston, Idaho, Spokane Kenworth and Spokane & Eastern Branch of the Seattle First National Bank, and other contracts on equipment, where the same will not be paid at the rate of \$2.00 per thousand under a prior assignment;

H. Lorenz Lumber Company upon secured items at the rate of \$1.25 per thousand feet, out of all moneys received by Party of the Second Part for logs hauled and delivered by Party of the First Part;

I. Life insurance premiums on policies hereinafter referred to;

J. The sum of \$200.00 per month child support under a decree of the Superior Court of the State of Washington, in and for the County of Asotin;

K. Unsecured creditors, pro-rata.

VIII.

All parties recognize that any secured creditors who enter into this arrangement for payment do so without waiving their security; and should said pool terminate without full payment having been made to said secured creditors, then and in that event said secured creditors may look to the security given by Party of the First Part for satisfaction of any balance owing to them. [33]

IX.

The Party of the First Part has the following policies of life insurance, to-wit:

Policy Number, Name, and Amount

1937383 — The Maccabees, Detroit, Michigan — \$3,000.00,

1852251 — Sun Life Assurance Co. of Canada — \$2,000.00,

1952847 — Sun Life Assurance Co. of Canada — \$5,000.00,

1710519 — Sun Life Assurance Co. of Canada — \$1,000.00,

1919863 — Sun Life Assurance Co. of Canada — \$3,000.00,

1755413 — Sun Life Assurance Co. of Canada — \$1,000.00,

1861701 — Sun Life Assurance Co. of Canada — \$10,000.00,

1861700 — Sun Life Assurance Co. of Canada — \$10,000.00,

OW-00N503872-47M—Mutual Benefit H&A Assn., Omaha—\$2,500.00,

PPA10029503-52M—Mutual Benefit H&A Assn.,
Omaha—\$5,000.00.

That the said party of the First Part, at the time of executing this assignment, has prepared the necessary documents to have Party of the Second Part herein made his beneficiary for the benefit of the creditors joining in this assignment in the event of his death; and Party of the First Part shall immediately deliver said policies of life insurance to Party of the Second Part for forwarding to the Home Offices of the companies issuing said policies so that appropriate endorsements may be attached thereto showing Party of the Second Part as beneficiary under the terms of said policies.

X.

In order to assist Party of the Second Part in carrying out this assignment, it is hereby provided that there shall be a Creditors Committee to assist in the management of the affairs of Party of the First Part as follows: J. J. Church, H. M. Emerson and C. D. Ough. In the event that one of the committee shall resign or for some other reason be unable to act, the remaining two may appoint some person to act in his place. It shall be the duty of the Creditors Committee to meet with Party of the Second Part when necessary and to construe this agreement and its construction thereof; and the decision of said Committee shall be final and conclusive. It may supply any defect or omission or may reconcile any inconsistency herein in such man-

ner or to such extent as it shall be necessary to carry out the same properly and effectively. It is intended hereby to confer upon the Committee any and all powers that it may deem necessary or [34] expedient to carry out the purposes of this agreement and the Committee may exercise any and every such power as will fully and effectively carry out this assignment as if the same were herein specifically enumerated.

Neither the Trustee nor the Committee, nor any of the members thereof, nor any depository holding funds which shall come to Party of the Second Part under this assignment assumes, nor shall assume, any personal responsibility or liability for acting under or for the execution of this agreement, or any part thereof, or for the results of any steps taken or acts done for the purposes thereof.

XI.

The Party of the First Part does hereby agree that this assignment shall constitute a Power of Attorney to Party of the Second Part to act in his behalf insofar as it may be required to carry out his duties under the terms of this assignment, and to that end may do any and all acts, matters and things necessary to carry into effect the true intent and meaning of these premises. Party of the First Part hereby covenants and agrees with Party of the Second Part that from time to time, and at all times when requested, to give Party of the Second Part all information respecting the assigned property or his income, and to further execute and de-

liver all necessary instruments which it will be essential for Party of the Second Part to have in order to carry into full effect the true intent and meaning of this assignment.

XII.

For the further security of the creditors participating in this plan, Party of the First Part agrees that should it become necessary to sell any of the property hereunder which is now owned by him or in which he has an equity, he will agree to and join with the Party of the Second Part in said sale, if ordered by a vote of the majority of the Creditors Committee. [35]

XIII.

For the further security of the creditors participating in this plan, Party of the First Part agrees to and does hereby mortgage and pledge to the Trustee all his interest and equity in all his assets listed in, but not limited to, the exhibits attached hereto and in all property hereafter acquired. Should this assignment terminate before full payment has been made hereunder, or should Party of the First Part cease operations or in any way violate this assignment, Party of the Second Part may then foreclose upon any property set out herein belonging to Party of the First Part, or upon any property which Party of the First Part shall hereafter acquire so long as this assignment is in full force and effect. Should it be necessary for the creditors participating in this plan to foreclose, as herein provided, said proceedings shall be brought

in the manner provided for by law for the foreclosure of mortgages.

XIV.

The Party of the First Part agrees that this assignment shall constitute a mortgage upon all of the property listed herein.

XV.

Nothing herein shall be construed, nor shall prohibit, Party of the First Part and Trustee from selling property upon such terms and conditions as they may be able to agree.

XVI.

This assignment shall remain in full force and effect until such time as all of the debts of Party of the First Part set out herein have been paid by the Trustee. This assignment shall be irrevocable by Party of the First Part [36] and he further agrees that during said period he will not make any other voluntary general assignments for the benefit of creditors.

This assignment may further be terminated:

A. When in the judgment of the Creditors Committee it would be useless to further continue said assignment in full force and effect; and,

B. Whenever Party of the First Part shall cease logging operations, and no payments are made to Party of the Second Part for a period of thirty (30) days. This provision shall not apply where weather conditions have prevented Party of the First Part from continuing his logging operations.

C. If bankruptcy proceedings be instituted against Party of the First Part.

XVII.

The creditors consenting to this assignment agree that they will not institute any legal actions against Party of the First Part for the collection of their accounts during the term of this assignment, except and unless bankruptcy proceedings, or other insolvency proceedings, are instituted against or by Party of the First Part, making this assignment no longer effective, or should this assignment be for any reason declared judicially invalid; in any of such cases this stipulation against legal actions shall be of no further force and effect.

XVIII.

Party of the First Part owes debts aggregating the total sum of \$994.10, each of which accounts are \$100.00 or less in amount, said debts being set out in Exhibit D, which is attached hereto. It is agreed between the parties hereto that Party of the First Part may pay off said accounts outside of this assignment by procuring a loan from his relatives or such other person as may advance sufficient moneys to pay these small obligations. It is agreed that these obligations are being left out of this assignment to [37] ease the work of Party of the Second Part and the Creditors Committee provided for herein.

XIX.

The Party of the First Part agrees not to incur any further indebtedness except such indebtedness as may be actually necessary for the operation of his logging business, and in no case to exceed the sum of \$1,000.00 without the consent of the Committee. Party of the First Part further agrees not to purchase any property except such small tools and other equipment as are immediately necessary for his logging operations without the consent of the committee.

XX.

This agreement shall be executed by Party of the First Part and by Party of the Second Part; and when the first division of funds is made, a copy shall be sent to each creditor receiving a dividend, along with said first payment. Creditors accepting said first payment are notified that by accepting the benefits of this agreement, they are binding themselves thereto and agree to conform with the terms of said agreement so long as the same remains in full force and effect.

In Witness Whereof, the parties have set their hands and seals on this 16th day of November, 1954, at Lewiston, Idaho.

/s/ ROBERT F. WEYEN,
Party of the First Part.

/s/ RALPH B. DEFENBACH,
Party of the Second Part. [38]

State of Idaho,
County of Nez Perce—ss.

On this 16th day of November, in the year of 1954, before me, Doris I. Barber, a Notary Public in and for the State of Idaho, personally appeared Robert F. Weyen, known to me to be the person whose name is subscribed to the foregoing instrument, and he acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official Seal the day and the year in this Certificate first hereinabove written.

[Seal] /s/ DORIS I. BARBER,
Notary Public in and for the State of Idaho, resid-
ing at Lewiston therein. [39]

EXHIBIT A

Accounts Payable

General Tire & Retreading Company, Lewiston,
Idaho: \$4,833.73.

Evergreen Garage, Lewiston, Idaho: \$1,815.64.

Lipps Insurance Agency, Lewiston, Idaho: \$1,464.06.

Union Oil Company: \$1,183.74.

Everett Roberts, Lewiston, Idaho: \$3,210.00.

Emmett Leeper, Estate: \$629.20.

Paul C. Keeton, Lewiston, Idaho: \$1,922.00.

Owen L. Knowlton, attorney for D. V. Garner: \$383.60.

Credit Adjustment Agency, Lewiston, Idaho (in-

cludes Standard Oil, Oud Hdwe and Perkins Ph):
\$1,204.35.

Samuel F. Swayne, Orofino, Idaho: \$890.60.

Claude Adams, rental: \$1,675.59.

Mrs. J. W. Henderson, rental of equipment:
\$906.80.

Jim Roberts, Lewiston, Idaho, Note: \$3,000.00.

J. D. Jacobs Company, Lewiston, Idaho: \$145.19.

State of Washington, fuel tax, Olympia, Wash-
ington: \$107.41.

General Petroleum, credit card purchases: \$648.80.

Employment Security Agency, Boise, Idaho, con-
tributions: \$3,086.59.

Idaho CleTrac Sales, Lewiston, Idaho: \$276.37.

Clearwater County Auditor's Office, Orofino:
\$464.60.

General Petroleum Co., bulk plant, Lewiston,
Idaho: \$2,207.55.

Erb Hardware, Lewiston, Idaho: \$918.95.

Mobil plant, Mike Hedler, Kendrick, Idaho: \$1,-
197.16.

Nick's Welding, Lewiston, Idaho: \$189.79.

Van R. Jones, Lewiston, Idaho, hauling equip-
ment: \$2,092.28.

Whipp's Stell and Welding Works, Lewiston,
Idaho: \$1,527.78.

Zirbel Truck Lines, Lewiston, Idaho: \$307.95.

Employers Mutuals of Wassau, Wisconsin: \$1,-
755.31.

Wasem's Furniture, Clarkston, open account:
\$324.70.

Veltex Credit Card: \$520.43.

Ed Stanfill, attorney, Clarkston, Washington:
\$500.00.

Nez Perce Tractor Co., Lewiston, Idaho, open account: \$4,352.31.

U. S. Government, Trespass: \$400.00.

Ed Deobald, Garage, Kendrick, Idaho: \$436.43.

Department of Labor & Industries, Olympia,
comp premiums:

First Security Bank, Lewiston, Idaho, repair agreement, truck: \$450.00.

State of Washington, Colfax, use tax: \$854.00.

Camas Oil, Lewiston, Idaho: \$1,001.63.

Gray-Webb Truck Services, Inc.: \$180.77.

Gray-Webb, rent on Carry-All truck: \$375.00.

Elfrieda May, Los Angeles, California, Notes:
\$6,581.10.

American Machine Works, open account: \$1,550.00. (Note: Subject to adjustment which will amount to approximately \$700.00.)

Sheriff's Office, Wallowa County, Oregon, taxes and interest: \$1,250.05.

County of Asotin, Washington, real property taxes: \$1,278.22.

McMonigle Chevrolet Co., Lewiston, Idaho, open account: \$258.20.

Potlatch Forests, Inc., Kamiah, Idaho (disputed):
\$4,611.22.

Potlatch Forests, Inc., Lewiston, Advances:
\$763.01.

Stumpage:

Tom Long, Kendrick, Idaho: \$500.00.

Rogers & Greer, approximately: \$300.00.

Frank Bogner, Nez Perce: \$225.00.

Esther Anderson, Clarkston, Washington: \$2,-500.00.

Ralph Stucker: \$400.00.

Byron Horton, assigned to John Speckard, Grande Ronde: \$450.00.

Carmen Patterson, tractor rental: \$873.00. [42]

EXHIBIT B

Secured Obligations

Director of Office of Internal Revenue, withholding and social security taxes, under a federal tax lien, approx: \$30,964.06.

Chat Mtg to Lorenz Lbr Co, which includes 1953 GMC Pickup, 1954 GMC Pickup, 1952 Fruehauf Traler and equity in D7 and D8.

Real Mortgage to Lorenz Lbr Co on 160 A at Greer: \$16,000.00.

CSC of Lorenz Lbr Co, including 1951 D7: \$10,-200.00.

CSC of Ch Mtg of Nez Perce Tractor Co., Lewiston, Idaho: 1952 D7, \$3,400.00; Dozer Attachment, \$239.75; 1952 D8 2U18439SP, \$6,948.05; 1953 D8 2U21777, \$15,886.00; 1954 D8 13A1160SP, \$21,-440.25; 1954 Arch, \$4,000.00; 1954 Tooth, \$250.00—\$52,164.05.

Ch Mtg to First Security Bank, Lewiston, on 1954 Buick: \$2,095.00.

Universal CIT, Portland, Oregon: 1953 A-C Tractor, \$11,747.97; Dozer Attachment, \$1,713.95—\$13,461.92.

Ch Mtg to Spokane Kenworth Co., 1954 Kenworth Truck: \$13,061.08.

To Spokane & Eastern Br of Seattle 1st Nat'l, repair plan of Spokane Kenworth Co. on 1954 Kenworth Truck, a second lien: \$2,933.40.

EXHIBIT C-1

Equipment

An equity in the following described machinery, to-wit:

- 1953 GMC Pickup Truck
- 1954 GMC Pickup Truck
- 1952 Fruehauf Trailer
- 1951 D7
- 1952 D7
- Dozer attachment
- 1952 D8 2U18439SP
- 1953 D8 2U21777
- 1954 D8 13A1160SP
- 1954 Arch
- 1954 Tooth
- 1953 A-C Tractor
- Dozer attachment
- 1954 Kenworth Truck
- 1954 Buick automobile

EXHIBIT C-2

Real Property

Equities in the following described timber, to-wit:

Dunlap place, Clearwater County Idaho: West

Half of the Southwest Quarter ($W\frac{1}{2} SW\frac{1}{4}$) and the Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4} NW\frac{1}{4}$) of Section Two (2), Township Forty (40) North, Range Four (4), E.B.M.

Keen Place, Shoshone County, Idaho: Northeast Quarter of the Northeast Quarter ($NE\frac{1}{4} NE\frac{1}{4}$) of Section Thirty-five (35), Township Forty-three (43) North of Range One (1), East of the Boise Meridian in Shoshone County, Idaho.

Near Greer, Idaho:

In Lewis County, Idaho: The North Half of the Southeast Quarter ($N\frac{1}{2} SE\frac{1}{4}$), the Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4} SE\frac{1}{4}$), North Half of the Southwest Quarter of the Southeast Quarter ($N\frac{1}{2} SW \frac{1}{4} SE \frac{1}{4}$), the Southeast Quarter of the Southwest Quarter of the Southeast Quarter ($SE \frac{1}{4} SW \frac{1}{4} SE \frac{1}{4}$), and $E\frac{1}{2} SW \frac{1}{4} SW \frac{1}{4} SE \frac{1}{4}$, Sec. 12, Twp. 34 N, R 2 EBM.

In Trinity County, California:

Division 1: Lot 7 of Section 9 in Township 3 South of Range 6 East, H.M. Lots 5, 6, 14, 19, 20, 21 and 22 of Section 10 in Township 3 South of Range 6 East, H.M.

Division 2: Parcel 1: The South half of the Northeast Quarter; the West Half of the Southeast Quarter of Section 9, in Township 3 South of Range 6 East, H.M. Parcel 2: The East half of the Southeast quarter of Section 9 in Township 3 South of Range 6 East, H.M.; the North half of the Southwest quarter of Section 10 in Township 3 South of Range 6 East H.M. Parcel 3: The Northeast quarter of the Northeast quarter of Section 17 in Town-

ship 3 South of Range 6 East, H.M.; the North half of the Northwest Quarter of Section 16 in Township 3 South of Range 6 East, H.M. Parcel 4: The Southeast quarter of the Southwest quarter of Section 10 in Township 3 South of Range 6 East, H.M.; the North half of the Northeast quarter of Section 15 in Township 3 South of Range 6 East, H.M.; the Northeast quarter of the Northwest quarter of Section 15 in Township 3 South of Range 6 East, H.M. Excepting Therefrom the following: Beginning at a black oak tree, 26 inches in diameter, scribed "B.M." being a Bench Mark tree on the survey of the Pauls Point-Mad River Road, near the Zenia Store in Section 15, Township 3 South, Range 6 East, H.M., and running thence Variation 20° East North 75° East 78 feet to a fir tree 4 inches in diameter scribed "X" the point of beginning, thence North 13° East 274.5 feet to a live oak tree 26 inches in diameter scribed X; thence North 85° West 132 feet W; thence South 13° West 274.5 feet; thence South 85° East 132 feet to the place of beginning, being situated in the East half of the Northwest quarter of Section 15, Township 3 South of Range 6 East, H.M. And Further Excepting Therefrom the following: One acre of land in the Southwest corner of the Northeast quarter of the Northwest quarter of Section 15 in Township 3 South of Range 6 East, H.M. Beginning at the Southwest corner running 16 rods East; thence 10 rods North, thence 16 rods West and 10 rods South to the Point of Beginning.

Division 3: The East one-half of the Southwest

quarter of Section 5, Township 3 South, Range 6 East, Humboldt Meridian.

Division 4: South Half of the Southeast Quarter of Section 8 and West Half of the Southwest Quarter of Section 9, both in Township 3 South, Range 6 East H.M.

Division 5: Lots 11 and 26 of Section 10 in Township 3 South of Range 6 East of Humboldt Meridian. [46]

EXHIBIT D

Accounts Under \$100.01

Willetts, Lewiston, Idaho: \$70.50.

Stokes & Radar, Attorneys at Arcata, California: \$36.47.

Cummins Diesel Sales, Inc., Spokane, Washington: \$19.25.

Henderson Motors, Lewiston, Idaho: \$38.51.

Vails, Lewiston, Idaho: \$7.47.

Haynes Equipment, Orofino, Idaho: \$30.60.

Lewiston Fur Shop, Lewiston, Idaho: \$47.70.

Harry Lutes, equipment rental: \$100.00.

Theodore H. Little, attorney at Clarkston, Washington, legal: \$99.97.

Morrell Construction Company, Lewiston, Idaho: \$71.00.

Mobil Dealer, Deary, Idaho: \$59.44.

Ralph Defenbach, Lewiston, Idaho: \$100.00.

Lewiston Cleaning Works, Lewiston, Idaho: \$5.25.

State of Idaho, Dept. of Highways, Lewiston: \$39.00.

Camas Oil Company, Orofino, Idaho: \$38.12.

C. Orno Shoemaker, Attorney at Clarkston, Washington: \$40.00.

Gray-Webb Buick, Lewiston, Idaho, open account: \$90.82.

Wallace-Frazier Title Company, Inc., Clarkston, Wash., Policy: \$100.00. [47]

[Endorsed]: Filed August 12, 1955.

[Title of District Court and Cause.]

ANSWER TO CROSS CLAIM OF E. J. STANFILL, AS TRUSTEE, AS GUARDIAN, AND AS EXECUTOR OF THE ESTATE OF ROBERT FRANCIS WEYEN, DECEASED

Comes now Ralph B. Defenbach, and for his answer to the Cross-Claim of E. J. Stanfill as Trustee, and as guardian of the estates of Daryl Weyen and Carolyn Weyen, minors, and as executor of the estate of Robert Francis Weyen, deceased, admits and denies as follows:

I.

Admits the allegations of Paragraph I of the Answer and Cross-Claim.

II.

Admits that E. J. Stanfill was designated as acting trustee for the minors Daryl Weyen and Carolyn Weyen, under and by virtue of a certain

Trust Agreement dated September 23, 1953, and that the same was recorded in Asotin County, Washington, on June 24, 1954, in Book 2 of Miscellaneous at Page 407, and further admits that Exhibit B is a copy of said trust agreement; but denies each and every other allegation contained [48] in Paragraph II of said Counter Claim.

III.

Referring to Paragraph III of said Cross-Claim, this answering defendant admits that E. J. Stanfill was at one time designated as beneficiary of certain policies listed in plaintiff's Complaint, but denies each and every other allegation contained in said paragraph.

IV.

Referring to Paragraphs IV, V, VI, VII, VIII, IX and X of said Cross-Claim, denies each and every allegation contained in said paragraphs, and the whole thereof.

Wherefore, this defendant prays that the Court deny any and all relief under said Cross-Claim as prayed for in said cross-claim and that the Court grant this answering defendant the relief prayed for in his Answer, which has heretofore been filed with the Court; and that he be granted such other and further necessary relief as he may be entitled to upon a hearing.

Dated this 29th day of August, 1955.

/s/ PAUL C. KEETON

R. MAX ETTER and ELLSWORTH

I. CONNELLY

/s/ By R. MAX ETTER

Attorneys for Ralph B. Defenbach,

Trustee

[49]

[Endorsed]: Filed Aug. 30, 1955.

[Title of District Court and Cause.]

ANSWER

Answering plaintiff's complaint, defendant El-frieda May, admits, denies and alleges:

I.

Admits all the allegations of said complaint and each count thereof excepting as follows:

1. Denies that said insurance policies or any thereof were legally or equitably assigned to Ralph B. Defenbach as trustee for creditors on November 24, 1954, or at any other time or that said Defenbach ever became the beneficiary thereunder as referred to in plaintiff's Second, Third and Fourth Counts.

2. Denies that E. J. Stanfill executed any assignments or conveyances as trustee.

3. Alleges that E. J. Stanfill was appointed guardian of the estates of said minors since plaintiff's complaint was prepared and is now acting as such.

For her Cross-Complaint herein, this defendant, Elfrieda May, alleges:

First Count

I. By reference defendant incorporates herein and realleges all of the allegations of paragraphs one to nine inclusive of plaintiff's First Count, except that this defendant alleges that E. J. Stanfill is now the guardian of [51] the estates of said minor children.

II. That shortly prior to September, 1953, said Robert Weyen, and Mary P. Weyen, husband and wife, the parents of Daryl Weyen and Carolyn Weyen, minors, (approximately six and eight years of age) entered into a property settlement and family support agreement for the disposition of all their property, present and inchoate and all rights therein and for the protection of each of them and for the protection of said minor children during their minority, under which it was agreed that Robert F. Weyen would pay \$200.00 per month for the support of said minors during their minority, and in order to protect them in the event of his death, that Mary P. Weyen would release all her claim as beneficiary and owner in all of the policies in the Second Count of the plaintiff's complaint in order that said minor children could be named irrevocable beneficiaries thereunder for their protection in the event of their father's death; that about August 19th, a written agreement was entered into accordingly under which said Robert F. Weyen and Mary P. Weyen agreed "that they will execute any

and all instruments necessary to carry out this agreement and the intent of the parties herein expressed", copy of which said agreement is now on file in Civil Cause No. 7456 of the Superior Court of Asotin County, Washington and is hereby referred to and made a part hereof.

III. That as part of the same transaction and agreement aforesaid and to protect said children and to carry out said understanding and agreement, said Robert F. Weyen filed Civil Cause No. 7456 in the Superior Court of Asotin County, Washington, for a divorce from Mary P. Weyen, and on September 22, 1953, the parties caused the above mentioned agreement to be presented to and considered by the presiding judge of said court and led said court to believe that said children were fully protected by the agreement of their parents, and said court relying thereon made and caused to be entered therein a decree of divorce and judgment approving said property settlement and its provisions for the protection of said children, which said judgment has never been modified or satisfied and is hereby referred to and made a part hereof.

IV. That further evidencing said agreement and the intent of the said parties to protect said children, Mary P. Weyen released all claim to the [52] policies listed in plaintiff's Second Count, both as beneficiary and co-owner and Robert F. Weyen on the following day—September 23, 1953—duly executed and E. J. Stanfill as trustee accepted, a voluntary, complete and irrevocable trust agreement for fifteen years, to E. J. Stanfill as trustee in fa-

vor of said minor children in which said Robert F. Weyen conveyed all of said policies named in plaintiff's First, Second, Third and Fourth Counts and all rights therein as beneficiary to the said E. J. Stanfill as trustee with directions for the application of the proceeds of said policies in the event of the death of said insured, Robert F. Weyen, reserving to the donor only the right to pledge the policies as collateral and to exercise any loan rights thereunder and with no reservation whatever of the right to change the beneficiary in any of the said policies.

V. That in further evidence of said agreement and for the further protection of said children, the said Robert F. Weyen thereafter caused said trust agreement, naming E. J. Stanfill trustee, as beneficiary in all of said policies, to be filed for record with the County Auditor of Asotin County, Washington, and the same was officially recorded in Book E of Miscellaneous Records, Page 407 thereof and is still of record and has never been changed, modified, rescinded or released of record.

VI. That in furtherance of said agreement for the protection of said children and evidencing his intent to carry out the same, the said Robert F. Weyen on the same date, namely September 23, 1953, duly executed his Last Will and Testament in which he recited that said minor children were his beneficiaries under insurance policies and protected accordingly, and that he left them no other property for such reason.

VII. Said trust agreement with E. J. Stanfill

was and is irrevocable until September 23, 1968 by its own terms, and E. J. Stanfill as such trustee is entitled to the proceeds of all policies involved herein in order to carry out the terms of said trust agreement for the benefit of said minor children.

Second Count

I. Defendant realleges all the allegations of paragraphs I to VII inclusive, of her First Count above stated. [53]

II. That the purported assignment from Robert F. Weyen to Ralph B. Defenbach as trustee for creditors, dated November 24, 1954, was and is without consideration and ambiguous, illegal, null and void and is inequitable and in fraud of said rights of said minor children of Robert F. Weyen for the following reasons:

A. Said creditors of Robert F. Weyen and said Defenbach as trustee thereof on and prior to November 24, 1954, had actual knowledge that Robert F. Weyen had conveyed all of said policies in trust to E. J. Stanfill and had made said Stanfill as such trustee, the beneficiary therein.

B. Said creditors of Robert F. Weyen and the said Defenbach as trustee on November 24, 1954, had constructive knowledge that said trust agreement with E. J. Stanfill was a complete, voluntary and irrevocable trust for the benefit of said minor children until September 23, 1968, and that said minor children were the beneficiaries under said trust and that said Robert F. Weyen did not in said trust agreement reserve or retain the right to

change said beneficiaries from E. J. Stanfill, trustee to any other person.

C. Said creditors of Robert F. Weyen and said Defenbach, as trustee, on November 24, 1954, had constructive knowledge that the Superior Court of Asotin County, Washington, had approved of the provisions by the parents of said minor children for the protection of said children in said decree and judgment of September 22, 1953, in said Civil Cause No. 7456 of said Court and did not reveal the Defenbach agreement to said Court nor any judge thereof, nor request the Court to modify said judgment, nor approve of said purported assignment, as it might affect the rights of said children, which had become vested.

D. This defendant is informed and believes that E. J. Stanfill did not by any consent to said Defenbach assignment, intend to change the said trust agreement of September 23, 1953, excepting to substitute Ralph B. Defenbach for E. J. Stanfill as trustee therein; and said E. J. Stanfill did not sign any instruments in connection therewith as "trustee" but only signed as an individual for such reason.

E. Said purported agreement to Ralph B. Defenbach provides, "The party of the first part does hereby agree that this assignment shall constitute a power of attorney to the party of the second part to act in his behalf."

F. Said purported assignment to Ralph B. Defenbach provides, "The party of the first part agrees that this assignment shall constitute a mortgage

upon all the property listed herein" and listed in said agreement are all the life insurance policies involved in this action, excepting that in Count One of plaintiff's Complaint.

G. Said purported agreement with Ralph B. Defenbach is clearly only an operating or managerial agreement.

Third Count

I. This defendant has paid many premiums upon the policies involved herein [54] on behalf of said insured, Robert F. Weyen, for the sole purpose of, and with the definite agreement and understanding between them, that the beneficial rights of said minor children would be preserved under said policies, and that they would remain the beneficiaries thereunder, and in reliance upon such understanding. That the creditors of Robert F. Weyen, represented by Ralph B. Defenbach, trustee, have paid none of such premiums and no other consideration for any rights as beneficiaries, but on the contrary have received the benefit of the funds borrowed on said policies, and it would now be unconscionable to deprive said minor children of said protection and said rights and a fraud against this defendant to have said trust and confidence held for naught.

Wherefore, this defendant prays:

1. That the court award all the funds involved herein or paid into court by plaintiff, less any attorneys' fees allowed to plaintiff, to defendant E. J. Stanfill, as trustee for the benefit of said minors,

Daryl Weyen and Carolyn Weyen, under said trust agreement of September 23, 1953, and/or to E. J. Stanfill as Guardian of the estates of said minors, and that Ralph B. Defenbach, as trustee, and Mary P. Weyen, individually, or as guardian, take nothing herein.

2. That if this Court should allow Ralph B. Defenbach an equitable division of the proceeds of said policies and should not allow all of the same to said trustee and guardian of the estate of said minors, that this court then allow this defendant a reasonable amount for payment of premiums on such policies and her expenses incurred herein for costs and attorney's fees, in preserving said assets and said benefits of said policies and keeping them in force for the benefit of those found to be entitled thereto.

3. That this defendant have judgment against defendant Ralph B. Defenbach for her costs incurred herein and for such other and further relief as to the court may seem just and proper.

/s/ C. C. ROWAN,

Attorney for Defendant,

Elfrieda May.

[55]

Affidavit of Service attached. [56]

[Endorsed]: Filed Aug. 15, 1955.

[Title of District Court and Cause.]

OPINION OF THE COURT

Driver, District Judge.

This is an interpleader action in which the plaintiff, Sun Life Assurance Company of Canada, a corporation, has deposited in the registry of the court the net proceeds of eight insurance policies on the life of Robert F. Weyen, who died on April 16, 1955. Several rival claimants to such proceeds have been impleaded as defendants.

There is little dispute as to the facts which, for the most part, are established by documentary evidence. On September 22, 1953, the insured, Robert F. Weyen, a resident of Asotin county, Washington, secured a decree of divorce in the superior court of that county from his wife, Mary P. Weyen. The mother was awarded the custody of the two minor children of the parties, Daryl Weyen and Carolyn Weyen. The father was required to pay \$200.00 a month for their support during their minority, and the insurance policies in suit, in accordance with the property settlement agreement entered into between the parties, were awarded to the insured, Robert F. Weyen. On the next day following the entry of the divorce decree, Robert F. Weyen executed a trust agreement or declaration of trust, in which he named his attorney, defendant E. J. Stanfill, as trustee, and stated that he had designated the trustee as beneficiary in ten life in-

surance policies.¹ The policies constituted the corpus of the trust. The trust was to continue for a period of fifteen years, and the beneficiaries were the two minor children of Robert F. Weyen. The trust instrument provided that in case of the death of Robert F. Weyen during the trust period, the trustee should collect the proceeds of the life insurance policies and use them for the education, maintenance, and support of the minor children. The trust agreement contained the following provision:

“The donor specifically reserves the right, during the term of this trust, to pledge any of such policies as collateral or to exercise the loan rights as provided in said policies, and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the Trustee named herein shall not be required to join in the application for said loans.” [192]

On the same day, September 23, 1953, Robert P. Weyen executed a last will and testament in which he stated that he had made no provisions for his minor children because “I have heretofore provided for them through Insurance Policies on my life; however, should said policies lapse or become null and void I hereby give, and devise and bequeath to my said children the sum of \$10,000.00 share and share alike.”

On November 16, 1954, Robert F. Weyen exe-

¹ Seven of the policies are involved in the present action. Three were issued by insurance companies other than the plaintiff.

cuted an assignment to a trustee for benefit of his creditors. In that document he stated he was in financial difficulties and unable to pay his debts, and that he assigned all his property, assets and income to defendant, Ralph B. Defenbach, as trustee for his creditors. Certain real property and a number of items of personal property were particularly described in the assignment, including all but one of the life insurance policies which are the subject of the present action.²

The paragraph of the assignment in which the life insurance policies were listed recited that Robert F. Weyen, the assignor, had prepared the necessary documents to have Ralph B. Defenbach made his beneficiary for the benefit of creditors "joining in this assignment" in the event of his death, and the assignor undertook immediately to deliver the policies to Defenbach for forwarding "to the home offices of the companies issuing said

² One insurance policy, No. 1,447,698, in the amount of \$2,000.00, listed in the trust agreement, was not included in the assignment for the benefit of creditors. Previously, on October 7, 1954, it had been assigned to Robert F. Weyen's mother, Elfrieda May. One policy, in the amount of \$6,000.00, listed in the assignment, is apparently listed under the wrong policy number in the trust agreement. Another policy in the amount of \$10,000.00 was issued to Robert F. Weyen on December 16, 1953, subsequent to the trust agreement, but the agreement evidently was intended to apply to it as the beneficiary named therein is "E. J. Stanfill, as trustee under Trust Agreement dated the nineteenth day of October, 1953." [Sic.]

policies so that appropriate endorsements may be attached thereto" showing Defenbach as beneficiary thereunder.³ The instrument further stated that "this assignment shall constitute a mortgage upon all of the property listed herein." [193]

The question presented for determination is whether the defendant, E. J. Stanfill as trustee in the trust agreement of September 23, 1953, or defendant, Ralph B. Defenbach as trustee in the assignment for benefit of creditors of November 16, 1954, is entitled to the proceeds of the life insurance policies which are listed in and covered by both instruments. Defendant Stanfill argues that the trust agreement of September 23, 1953, set up an irrevocable trust whereby the trust settlor, Robert F. Weyen, divested himself of the right to change the beneficiary, and created in the trustee for the benefit of his minor children a vested right in the proceeds of the insurance policies, which constituted the corpus of the trust. The donor, Weyen, could not thereafter without the consent of his children, it is argued, make defendant Defenbach as trustee for his creditors, the beneficiary under the policies. The record not only shows no such consent on their part but, since they were minors, they were incapable of giving effective consent.

³ The assignment also recited that as further security for the participating creditors, the assignor, Robert F. Weyen, "agrees to and does hereby mortgage and pledge to the trustee all his interest and equity in all his assets * * *" (Emphasis supplied.)

It seems to me that it is not necessary to decide whether the trust agreement set up an irrevocable trust so far as the right to change the beneficiary is concerned. By its plain terms, the document specifically reserved a right in the donor Weyen to exercise the loan rights as provided in the policies and "to pledge any of such policies as collateral."⁴ There can be no doubt as to what Weyen intended by the language just quoted. The trust agreement was drafted by a lawyer, and in legal parlance "pledging as collateral" means putting up property as security for a debt additional to the personal obligation of the debtor. Pledging for collateral provides concurrent additional security for the payment of the debt, whether it is antecedent or newly created.⁵

By his trust agreement and last will, Robert F. Weyen clearly indicated that he desired to make provision for the support [194] of his minor children in case of his death. But he was a comparatively young man—only thirty-five years of age at the time he executed the agreement—and it may be assumed that he was in ordinary good health as the record shows that he procured life insurance in the amount of \$10,000.00 on December 16, 1953,—only a year and four months prior to his death. He died as

⁴ Change of beneficiary to Defenbach was never effected in the manner provided in the policies.

⁵ See 7A Words and Phrases 227; Third Nat. Bank vs. Hall (Tenn.), 209 S.W.2d 46, 50; Ex Parte Boddie (S. Car.), 21 S.E.2d 4, 7; McCormick vs. Falls City Bank, (7 Cir.), 57 Fed. 107, 110.

the result of an accident, and not from disease. It may be assumed that he had every expectation of living through the fifteen-year period of the trust. The trust, to say the least, was a very thin one, depending for its fruition on a number of contingencies. The children could not have benefited from it unless the father died during the period of the trust, the children survived him, and prior to his death he had not permitted the policies to lapse for failure to pay the premiums. Weyen was a large-scale logging contractor, which is not generally regarded as one of the more stable forms of business activity, and he was burdened by the divorce decree requirement that he pay two hundred dollars a month for the support of his two children. When he set up the life insurance trust for his children, obviously he wished to reserve his life insurance as a useful credit resource.⁶ When he got into serious

⁶ In *Massachusetts Mutual Life Insurance Company vs. Bank of California*, 187 Wash. 565, 570, the Washington State Supreme Court said:

“In these modern, complex times, the right of every man to use his accumulations to pay his debts, especially when he has pledged them to obtain liquid capital, ought not to be limited or abridged, except only in those instances where, by his own act, he has barred his own right of control by creating an irrevocable vested interest in another or others. Life insurance, during the life of the insured, forms a reserve to be drawn upon in times of stress, and many have improved their fortunes and bettered the condition of their dependents by drawing liquid capital from that source to enable them to maintain or renew their business activities.”

financial difficulties in November of 1954, Weyen took advantage of the reservation he had made in his declaration of trust and, in effect, pledged the life insurance policies as collateral security for the payment of his debts. It was not necessary for him to change the beneficiary in order to accomplish that purpose. Indeed, if he had gone through all the forms of [195] changing the beneficiary, or had undertaken to make a complete and unconditional assignment of his life insurance, it would have been regarded in legal effect as an assignment, or pledging for security, as that plainly appeared to be the intention of the parties. There can be no doubt from consideration of the entire instrument of assignment for creditors that, Weyen did not intend to make defendant Defenbach, his trustee, the unconditional beneficiary of his life insurance, or to convey unconditionally to such trustee all of his property, but intended, rather, to pledge his assets, including his life insurance, as security for the payment of his debts.

It is a well-established, general rule that, if the parties so provide, a pledge of a life insurance policy can be made to secure all existing indebtedness of the assignor to the assignee.⁷ When a policy of life insurance has been pledged or assigned as se-

⁷ *National Bank of Kentucky vs. Gallagher* (Ky.), 49 S.W.2d 1006, and *Johnson vs. Johnson* (Ky.), 178 S.W.2d 983; 45 C.J.S. 41, Sec. 419; and *Couch on Insurance* (1930 Ed.), Vol. 6, Sec. 1458u, p. 5257. Also see, *Couch Cyclopedia of Insurance Law* (1945 Cumulative Supp.), Vol. II, pp. 1821-1822.

curity for the payment of a debt, upon the death of the insured the pledgee or assignee is entitled to so much of the proceeds of the insurance policies as may be necessary to pay the debt.⁸

Since jurisdiction in the instant case is based upon diversity of citizenship of the parties, the governing substantive law is that of the state of Washington. No case has been brought to my attention, however, which indicates that Washington does not follow the general rules as stated above. Indeed, in *Massachusetts Mutual Life Insurance Co. v. Bank of California*, 187 Wash. 565, the Washington State Supreme Court held that, when a life insurance policy by its language, recognizes the right of the insured to assign it, and when the insured may change the beneficiary, one to [196] whom it has been assigned as security for a debt will be held to have a prior right to so much of the

⁸ *Detroit Life Insurance Company vs. Linsenmier* (Mich.), 217 N.W. 919; *Minnesota Mutual Life Ins. Co. vs. Manthei* (Mo.), 189 S.W.2d 144; and *Morrow vs. National Life Ass'n of De Moines, Iowa* (Mo.), 168 S.W. 881. The great weight of authority is to the effect that where a life insurance policy reserves to the insured the right to change the beneficiary and is such that the insured has the right to assign the same, he may make such assignment without the consent of the beneficiary designated in the policy and without complying with the provisions of the policy prescribing the manner of changing the beneficiary, and upon the death of the insured, the assignee is entitled to the proceeds of the policy to the extent of his interest, as against the beneficiary. 135 A.L.R. 1040-1041.

proceeds as may be required to discharge the debt secured.

In the instant case, as I have pointed out, it is immaterial whether the trust agreement deprived the insured, Robert F. Weyen, of the right to change the beneficiary for the reason that, specifically, in the agreement itself, he reserved the right to pledge the insurance policies as collateral security for the payment of his debts.

At the time of his death, the total amount of Weyen's debts covered by his assignment for the benefit of his creditors greatly exceeded the total net proceeds of his life insurance policies. The defendant, Ralph B. Defenbach, therefore, will recover the net proceeds of the life insurance policies impleaded herein except policy number 1,447,698 assigned to Elfrieda May, and mentioned above in footnote 2, after deducting the plaintiff's costs and attorney fee as determined by the court. Defendant, E. J. Stanfill as trustee for Daryl Weyen and Carolyn Weyen, will recover like net proceeds of policy number 1,447,698. It appeared at the trial that the defendant Elfrieda May was not contesting the proceeds of such policy so far as the interests of the minor children were concerned. At any rate, it is doubtful, to say the least, that the policy could validly be assigned by Robert F. Weyen except by way of pledge as collateral security, and I recall no evidence in the record that it was held by Elfrieda May for security for any indebtedness owing to her by the deceased, Robert F. Weyen. None of the de-

feudants will recover any costs against any other defendant, nor against the plaintiff.

/s/ SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed Dec. 15, 1955.

[197]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause coming on duly and regularly for trial on Tuesday, the 18th day of October, 1955, at ten o'clock a.m., in the court rooms of the above entitled court at Spokane, Washington, before the Honorable Sam M. Driver, judge of the above entitled court, the plaintiff was represented by the law firm of Graves, Kizer, Greenough & Gaiser of Spokane, Washington; and the defendant Mary P. Weyen, individually and as guardian of Daryl Weyen and Carolyn Weyen, minors, was represented by S. Dean Arnold of Clarkston, Washington; the defendant Elfrieda May was represented by C. C. Rowan of Spokane, Washington; the defendant Ralph B. Defenbach as trustee was represented by Paul C. Keeton of Lewiston, Idaho, and R. Max Etter of Spokane, Washington; and the defendant E. J. Stanfill as trustee and E. J. Stanfill as executor of the estate of Robert Francis Weyen, deceased, was represented by S. Dean Arnold of Clarkston, Washington. All of the attorneys for the

respective parties were present in court; and Elfrieda May, Ralph B. [198] Defenbach and E. J. Stanfill appeared personally.

All parties having announced their readiness to proceed with the trial, the Court heard testimony of witnesses called by both the plaintiff and the defendants and examined documentary evidence presented by the parties, and having heard oral arguments by the attorneys for the defendants at the conclusion of the trial and they having been allowed sufficient time for the submission of briefs by all parties, and the Court having been fully advised in the premises now makes it

Findings of Fact

The Court finds:

I.

That this Court has jurisdiction of said cause and all of the parties thereto on account of Sec. 2361 of the United States Code which provides for interpleading causes of action, one of which is cases involving life insurance policies as in the case at bar; that in accordance with the interpleader statute, the plaintiff Sun Life Assurance Company of Canada, a corporation, has deposited in the registry of the court the net proceeds of eight life insurance policies on the life of Robert F. Weyen, who died accidentally on April 16, 1955; the defendants, being rival claimants to the proceeds of the policies, they have been impleaded as defendants.

II.

That the policies interpleaded in this action by the Sun Life Assurance Company of Canada, a corporation, plaintiff, are as follows: No. 1,447,698; No. 1,852,251, No. 1,952,847; No. 1,710,519; No. 1,919,863; No. 1,755,413; No. 1,861,701 and No. 1,861,700.

III.

That on September 22, 1953, Robert F. Weyen was a resident of Asotin County, state of Washington, and secured a decree of divorce in the Superior Court of that county from his wife, Mary P. Weyen; that Mary P. Weyen was awarded custody of the two minor children of the parties, namely, Daryl Weyen and Carolyn Weyen. That as a part of the divorce proceedings, Robert F. Weyen was required to pay Two Hundred (\$200.00) Dollars per month for the support of said minor children during their minority; and the insurance policies in suit, in accordance with the Property Settlement Agreement entered into between the parties, were awarded to the insured, Robert F. Weyen.

IV.

That on September 23, 1953, Robert F. Weyen executed a trust agreement, or declaration of trust, in which he named his attorney, the defendant E. J. Stanfill, as trustee, and stated that he had designated the trustee as beneficiary of ten life insurance policies, seven of which policies are involved in the present action, three being issued by insurance companies other than the plaintiff. The policies consti-

tuted the corpus of the trust. The trust was to continue for a period of fifteen years and the beneficiaries were the two minor children of Robert F. Weyen. The trust agreement provided that in case of the death of Robert F. Weyen during the trust period, the trustee should collect the proceeds of the life insurance policies and use them for the education, maintenance and support of the minor children. The trust agreement contained the following provision:

"The donor specifically reserves the right, during the term of this trust, to pledge any of such policies as collateral or to exercise the loan rights as provided in said policies, and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the Trustee herein named shall not be required to join in the application for said loans." [200]

V.

That on September 23, 1953, Robert F. Weyen executed a Last Will and Testament, in which he stated that he had made no provision for his minor children because, "I have heretofore provided for them through insurance policies on my life; however, should said policies lapse or become null and void, I hereby give, and devise and bequeath to my said children the sum of \$10,000.00, share and share alike."

VI.

That prior to November 16, 1954, Robert F. Weyen had become involved in financial difficulties

and was unable to pay his debts; and that on November 16, 1954, he executed an assignment to Ralph B. Defenbach as trustee for the benefit of his creditors. In that document he assigned all his property, assets and income to Ralph B. Defenbach as trustee for his creditors. Certain real property and a number of items of personal property were particularly described in the assignment and said assignment included all *by* one of the life insurance policies which are the subject of the present action. The policies assigned to Ralph B. Defenbach as trustee are as follows:

1,852,251, Sun Life Assurance Co. of Canada,
\$2,000.00.

1,952,847, Sun Life Assurance Co. of Canada,
\$5,000.00.

1,710,519, Sun Life Assurance Co. of Canada,
\$1,000.00.

1,919,863, Sun Life Assurance Co. of Canada,
\$3,000.00.

1,755,413, Sun Life Assurance Co. of Canada,
\$1,000.00.

1,861,701, Sun Life Assurance Co. of Canada,
\$10,000.00.

1,861,700, Sun Life Assurance Co. of Canada,
\$10,000.00.

Pursuant to the assignment to the defendant Defenbach, the necessary documents were prepared and the assignor delivered the policies to Defenbach

for forwarding to the home offices of the companies issuing said policies so that appropriate endorsements might be attached thereto showing Defenbach as beneficiary thereunder. In this manner said policies were [201] pledged to defendant Ralph B. Defenbach as trustee for the creditors of Robert F. Weyen.

VII.

By its terms the Stanfill Trust specifically reserved a right to the donor, Robert F. Weyen, to exercise the loan rights as provided in the policies of insurance and "to pledge any of such policies as collateral;" that this trust agreement was drafted by a lawyer and the right to pledge as collateral reserved to the donor a means of putting up the policies as security for a debt additional to the personal obligation of the debtor. The right reserved to pledge the insurance policies as collateral applied to security for the payment of debts, whether they be antecedent or newly created.

VIII.

When Robert F. Weyen got into serious financial difficulties in November of 1954, he took advantage of the reservation he had made in his declaration of trust and did pledge the life insurance policies as collateral security for the payment of his debts. It was not necessary for him to change the beneficiary in order to accomplish that purpose; that in executing the Assignment to Trustee for Benefit of Creditors dated November 16, 1954, Robert F.

Weyen intended to pledge his assets including his life insurance as security for the payment of his debts.

IX.

That the Court finds that prior to the time of the execution of the Assignment to Trustee for Benefit of Creditors on November 16, 1954, Robert F. Weyen had assigned to the defendant Elfrieda May policy No. 1,447,698, to which policy no claim is made by the defendant Defenbach; [202] that during the trial of said cause, the defendant Elfrieda May did not contest the right of the minor children Daryl Weyen and Carolyn Weyen to the proceeds of said policy; that there is no evidence in the record that said policy was assigned to Elfrieda May for security for any indebtedness owed to her by the deceased; that the net proceeds of said policy should be awarded to E. J. Stanfill as trustee for Daryl Weyen and Carolyn Weyen.

X.

That the courts as a general rule have recognized the right of a plaintiff in interpleader actions to recover from the funds deposited in the registry of the court their costs and a reasonable attorney fee. The Court finds that in addition to their costs, the plaintiffs are entitled to a reasonable attorney fee in the amount of two percent of the total sum deposited by the plaintiff with the registry of the court.

Conclusions of Law

The Court concludes:

First: That the seven (7) insurance policies involved in this action and assigned to Ralph B. Defenbach by their language recognize the right of the insured to assign the same and that under the terms of the trust agreement dated September 23, 1953, Robert F. Weyen reserved the right to pledge any of such policies as collateral; that the defendant Ralph B. Defenbach therefore will recover the net proceeds of all life insurance policies impleaded herein except Policy No. 1,477,698, which was assigned to Elfrieda May.

Second: That the defendant Elfrieda May having not contested the proceeds of Policy No. 1,447,698 insofar as the interests of said minor [203] children were concerned, the defendant E. J. Stanfill as trustee for Daryl Weyen and Carolyn Weyen, minors, will recover the net proceeds on said policy.

Third: None of the defendants will recover any costs against any other defendant or the plaintiff.

Fourth: That the plaintiff having impleaded said policies and having deposited with the registry of the court the net proceeds of said policies and in all ways having complied with their duties in interpleading in said cause, the action insofar as the plaintiff is concerned is dismissed.

Fifth: That the attorneys for the plaintiff are entitled to recover an attorney fee of two percent of the amount deposited with the registry of the

court, which fee is allowed together with plaintiff's court costs.

Dated at Spokane, Washington, on this 30th day of December, 1955.

/s/ SAM M. DRIVER,
United States District Judge

Presented by:

/s/ R. Max Etter

/s/ Paul C. Keeton,

Attorneys for Defendant Ralph B. Defen-
bach

Service of Copy Acknowledged. [204]

[Endorsed]: Filed December 30, 1955.

In the United States District Court for the Eastern
District of Washington, Northern Division

No. 1309

SUN LIFE ASSURANCE COMPANY OF CAN-
ADA, a corporation, Plaintiff,

vs.

MARY P. WEYEN, etc., et al., Defendants.

JUDGMENT

The above entitled cause having come on duly and regularly for trial before the Honorable Sam M. Driver, Judge of the above entitled court, for non-jury trial on Tuesday, the 18th day of October,

1955, at the court rooms of the above entitled court in Spokane, Washington, at ten o'clock a.m., the plaintiff being represented by the law firm of Graves, Kizer, Greenough & Gaiser of Spokane, Washington; and the defendant Mary P. Weyen, individually and as guardian of Daryl Weyen and Carolyn Weyen, minors, being represented by S. Dean Arnold of Clarkston, Washington; the defendant Elfrieda May being represented by C. C. Rowan of Spokane, Washington; the defendant Ralph B. Defenbach as trustee being represented by Paul C. Keeton of Lewiston, Idaho, and R. Max Etter of Spokane, Washington; and the defendant E. J. Stanfill as trustee and E. J. Stanfill as executor of the estate of Robert Francis Weyen, deceased, being represented [205] by S. Dean Arnold of Clarkston, Washington. All of the attorneys for the respective parties were present in court; and Elfrieda May, Ralph B. Defenbach and E. J. Stanfill appeared personally.

All parties having announced their readiness to proceed with the trial, the Court heard testimony of witnesses called on behalf of the plaintiff and the defendants and examined documentary evidence introduced by all parties; and the case having been submitted to the Court and Findings of Fact and Conclusions of Law having been entered, and having directed that judgment be entered in accordance therewith,

Now, Therefore, by reason of the law and the Findings aforesaid, It Is Ordered, Adjudged and Decreed as follows:

First: That Ralph B. Defenbach, trustee, have and recover the net proceeds of the following numbered policies, said proceedings having been deposited with the registry of the court, to-wit:

1,852,251, Sun Life Assurance Co. of Canada,
\$3,683.15.

1,952,847, Sun Life Assurance Co. of Canada,
\$9,767.30.

1,710,519, Sun Life Assurance Co. of Canada,
\$1,606.58.

1,919,863, Sun Life Assurance Co. of Canada,
\$5,746.87.

1,755,413, Sun Life Assurance Co. of Canada,
\$1,702.49.

1,861,701, Sun Life Assurance Co. of Canada,
\$19,603.42.

1,861,700, Sun Life Assurance Co. of Canada,
\$19,603.42.

Second: That E. J. Stanfill as trustee for Daryl Weyen and Carolyn Weyen, minors, recover the net proceeds of Policy No. 1,447,698, being \$1,831.20, and said proceeds having been deposited with the registry of the court by the plaintiff;

Third: That the action be, and the same is hereby dismissed insofar as the plaintiff is concerned.

Fourth: That the plaintiff have and recover from the moneys deposited with the registry of the court an attorney fee of two percent of [206] the total sums on deposit; and in addition thereto, that the plaintiff have and recover his court costs necessarily expended in said action.

Fifth: That the defendant Mary P. Weyen, in-

dividually and as guardian of Daryl Weyen and Carolyn Weyen, minors, take nothing.

Sixth: That none of the defendants shall recover any costs against any other defendant nor against the plaintiff.

Dated at Spokane, Washington, on this 30th day of December, 1955.

/s/ SAM M. DRIVER,

United States District Judge

Presented by:

/s/ R. Max Etter,

/s/ Paul C. Keeton,

Attorneys for Ralph B. Defenbach.

Service of Copy Acknowledged. [207]

[Endorsed]: Filed December 30, 1955.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO AMEND
FINDINGS, CONCLUSIONS AND JUDG-
MENT

The above named defendant, E. J. Stanfill, as trustee, has presented to the Court and filed a motion to amend the findings, conclusions and judgment in the above cause. The defendant's reasons for asking such amendment, and the legal and factual theories on which his motion is based, were fully presented and argued to the court in the course of the trial, and the Court feels that he is

thoroughly acquainted therewith. The Court therefore considers it reasonable and proper that the motion be acted upon and denied without notice of hearing or oral argument, pursuant to the provisions of Rule 78, of the Rules of Civil Procedure for District Courts.

It Is Now Therefore Ordered that the motion of defendant, E. J. Stanfill, as trustee, to amend the findings, conclusions and judgment in the above entitled cause, is denied.

Done this 19th day of January, 1956.

/s/ SAM M. DRIVER,

U. S. District Judge [208]

[Endorsed]: Filed January 19, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The above entitled Court and to Stanley Taylor, Clerk thereof and to Ralph B. Defenbach, as Trustee:

You are hereby notified that the defendants E. J. Stanfill, as trustee and Elfrieda May, above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit of the United States of America, from the Findings of Fact, Conclusions of Law and Judgment made and entered herein December 30, 1955, and all intervening orders therein and from

the Order Denying Defendants' Motion to Amend Findings, Conclusions and Judgment entered herein January 19, 1956 and from each and every and the whole thereof.

Dated this 15th day of February, 1956.

E. J. STANFILL

As Trustee and

ELFRIEDA MAY,

/s/ By S. DEAN ARNOLD,

/s/ C. C. ROWAN,

Their Attorneys

[209]

[Endorsed]: Filed February 15, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
THE APPELLANTS WILL RELY

To: The above entitled Court and to Stanley Taylor, Clerk thereof; to the Honorable United States Court of Appeals for the Ninth Circuit and to Appellee, Ralph B. Defenbach, as Trustee:

You and Each of You Are Hereby Notified that appellants E. J. Stanfill, as Trustee and Elfrieda May, intend to rely on the following points in their appeal of the above entitled action to the Ninth Circuit Court of Appeals:

I.

The Findings of Fact, Conclusions of Law and

Judgment are in conflict with and contrary to the evidence.

II.

The Stanfill Trust (Defendants Exhibit 25) was irrevocable for fifteen (15) years as to the beneficiary of the insurance policies conveyed by the insured.

III.

The minor children of the donor acquired a vested interest as beneficiaries of the policies when the Stanfill Trust (Defendants Exhibit No. 25) was executed and the policies delivered. [212]

IV.

No power of revocation is contained in the Stanfill Trust (Defendants' Exhibit No. 25).

V.

The only reservation by the donor in the Stanfill Trust (Defendants' Exhibit No. 25) was the right to borrow thereon, either by pledge, to secure the loan or exercise the loan rights thereon.

VI.

The reservation in the Stanfill Trust, (Defendants' Exhibit No. 25), being in the alternative, Weyen and his assignee, Defenbach, exercise their maximum rights as to four (4) policies (Plaintiffs Exhibit Nos. 5, 6, 7 and 8) by exercising the loan rights thereon with the company subsequent to the Defenbach assignment and could not exercise the additional right of pledge.

VII.

The recording of the Stanfill Trust (Defendants Exhibit No. 25) and the execution of decedent's Will (Defendants Exhibit No. 24) corroborate the intention of the donor to protect his minor children with insurance.

VIII.

The Defenbach Assignment (Defendants Exhibit No. 27) carries no greater interest in the policies than reserved to the donor of the trust; an Assignee for the benefit of creditors is not a bona fide purchaser for value.

IX.

The Defenbach Assignment (Defendants Exhibit No. 27) has never been construed, is ambiguous and conflicting within itself and could not pass interest to the creditors which the assignor did not have; the Defenbach Assignment was intended as an operating and managing agreement only and terminated with the death of Weyen. [213]

X.

The right to change beneficiaries, not having been reserved to the trustor, such change cannot be indirectly accomplished under the guise of assignment or pledge.

XI.

Elfrieda May, by and through Stanfill as Trustee and on behalf of the minor children, is entitled to the \$3,000.00 paid by her to secure the Defenbach agreement.

Dated this 15th day of February, 1956.

E. J. STANFILL

As Trustee and

ELFRIEDA MAY,

/s/ By C. C. ROWAN,

/s/ S. DEAN ARNOLD,

Attorneys for Appellants

Receipt of Copy attached. [214]

[Endorsed]: Filed February 15, 1956.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To: The above entitled Court and to Stanley Taylor, Clerk thereof and to Defendant Ralph B. Defenbach and his attorneys Paul C. Keeton and R. Max Etter:

You are hereby notified that the defendants E. J. Stanfill, as trustee, and Elfrieda May have appealed the above entitled action to the United States Court of Appeals for the Ninth Circuit and that said defendants so appealing hereby designate the following portions of the record, proceedings and evidence to be contained in the record on appeal, to-wit:

1. Plaintiff's Complaint.
2. Answer and Cross-Claim of E. J. Stanfill as Trustee.
3. Answer of Ralph B. Defenbach as Trustee.

4. Answer of Ralph B. Defenbach as trustee to Cross-Claim of E. J. Stanfill as trustee.

5. Answer of Elfrieda May.

6. Memorandum opinion of the trial court.

7. Findings of Fact, Conclusions of Law and Judgment.

8. Order Denying Motion to Amend Findings, Conclusions and Judgment.

9. Transcript of all evidence furnished by Court Reporter.

10. Notice of Appeal.

All exhibits to be filed in said Circuit Court as such.

Dated this 15th day of February, 1956.

E. J. STANFILL

As Trustee, and

ELFRIEDA MAY,

/s/ By S. DEAN ARNOLD,

/s/ C. C. ROWAN,

Their Attorneys

Acknowledgment of Service attached. [215]

[Endorsed]: Filed February 15, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the original documents filed in the above entitled cause, to-wit:

Complaint.

Answer and Cross Claim—E. J. Stanfill as Trustee.

Answer—Mary P. Weyen.

Answer—Ralph B. Defenbach, as Trustee.

Answer—Ralph B. Defenbach to Cross Claim of E. J. Stanfill.

Answer—Elfrieda May.

Court Reporter's Record of Proceedings at Trial.

Exhibits—(Enclosed herewith but not attached hereto):

Plaintiff's

1. Policy No. 1447698, \$1,000.00.
2. Policy No. 1710519, \$1,000.00.
3. Policy No. 1755413, \$1,000.00.
4. Policy No. 1852251, \$2,000.00.
5. Policy No. 1861700, \$10,000.00.
6. Policy No. 1861701, \$10,000.00.
7. Policy No. 1919863, \$3,000.00.

8. Policy No. 1952847, \$5,000.00.
9. Policy Loan Agreements.
10. Claimant's Statements and correspondence.
11. File of assignments, correspondence, etc.
12. Letter 11/30/53 Weyen to Sun Life.
13. Letter 5/21/55 Defenbach to White.
14. Policy record card 1447698.
15. Policy record card 1710519.
16. Policy record card 1755413.
17. Policy record card 1852251.
18. Policy record card 1861700.
19. Policy record card 1861701.
20. Policy record card 1919863.
21. Policy record card 1952847.
22. Group of checks.

Defendant Stanfill's

23. Decree of Divorce.
24. Copy of Will.
25. Copy of Trust Agreement.
26. Letters of Guardianship.

Defendant Defenbach's: 27. Agreement for benefit of creditors.

Defendant Stanfill's: 28. Letter 1/13/55 Sun Life to Keeton.

Opinion of the Court.

Findings of Fact and Conclusions of Law.

Judgment.

Order denying motion to amend Findings, Conclusions and Judgment.

Notice of Appeal.

Notice of Bond.

Clerk's Certificate as to Bond on Appeal.

Statement of Points on which the Appellants will rely.

Designation of Record and that the same constitute the record for hearing of the appeal from the judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit, as set forth in the Appellant's Designation of Record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 15th day of March, A. D. 1956.

[Seal] /s/ STANLEY D. TAYLOR,

Clerk, U. S. District Court, Eastern
District of Washington

In the United States District Court for the Eastern
District of Washington, Northern Division

Civil No. 1309

SUN LIFE ASSURANCE COMPANY OF CAN-
ADA, a corporation, Plaintiff,

VS.

MARY P. WEYEN, etc., et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

Appearances: Joseph W. Greenough, of Graves, Kizer, Greenough & Gaiser, for the Plaintiff. R. Max Etter, of R. Max Etter and Ellsworth I. Connelly, and Paul C. Keeton for the Defendant, Ralph B. Defenbach, Trustee. C. C. Rowan for the defendant, Elfrieda May. S. Dean Arnold, for the defendants Mary P. Weyen and E. J. Stanfill in their respective capacities. [59]

Be It Remembered that the above-entitled cause came on before the Honorable Sam M. Driver, Judge of the above-entitled Court, at Spokane, Washington, on October 18, 1955, at 10 o'clock a.m. for trial, whereupon the following proceedings were had:

The Court: Are you ready, gentlemen, in Sun Life Assurance Company of Canada against Mary P. Weyen and others?

Mr. Greenough: Plaintiff is ready, your Honor.

The Court: As the Clerk has suggested here, a number of parties are represented by different at-

torneys. I wonder if it wouldn't be a good way to start here for each of you to announce whom you represent, and so that the reporter may get a record of it, we might start with the Sun Life Assurance Company. That is Mr. Greenough, I presume.

Mr. Greenough: Yes, represented by Graves, Kizer, Greenough & Gaiser, J. W. Greenough, counsel.

The Court: I wish to say, Mr. Greenough, before it escapes my attention, that I wish to compliment you on almost your unique example you have set here of properly denominating your various claims as "counts" instead of "causes of action."

Mr. Greenough: I think I can give the credit right back to your Honor because when I was arguing the Williamson v. Otis Elevator case against Max Etter, who happens to be in this case, your Honor observed that there was no such thing as a cause of action under the new Federal rules of pleadings, so [60] I have been forever cured by that of the bad habit of calling them causes of action. From now on, they are going to be counts as the forms in the rule book and the rules themselves say.

The Court: You represent the Sun Life Assurance Company?

Mr. Greenough: Yes, your Honor.

The Court: All right. Now, let's see, Mary P. Weyen, is she represented here?

Mr. Arnold: Your Honor, I am S. Dean Arnold of Clarkston. Mary P. Weyen was made a guardian and since that time she has resigned as guardian of

the estate of the children. Mr. E. J. Stanfill has been substituted as such and has appeared accordingly here, and I represent Mr. Stanfill in his capacity as trustee, as guardian, and as the executor of the estate of the deceased.

The Court: I see, all right.

Elfrieda May, is she represented?

Mr. Rowan: Elfrieda May, she was a creditor and was the mother of the deceased, grandmother of the children, and was named in several of the policies and paid premiums upon some. I represent her.

The Court: And Ralph B. Defenbach?

Mr. Etter: He is represented, your Honor, by Mr. Paul Keeton of the Idaho bar, and by me. [61]

The Court: And then E. J. Stanfill, as trustee and executor of the estate of Robert Francis Weyen?

Mr. Arnold: Yes.

The Court: You represent him, that's right, I remember. All right, then, do you gentlemen wish to make opening statements here to begin with? It might be helpful, it is hard to determine from the file just what the conflicting claims are, and I think we might be able to straighten it out a little by some opening statement.

Mr. Greenough: I think I might add to the speeding of the proceedings here by just a few remarks, your Honor.

Of course, the plaintiff here is just a stakeholder and is entirely impartial as between the claimants. The amount tendered into court here, as your

Honor may have observed, is \$63,544.43. That amount was tendered in to the Clerk at the time the complaint was filed and the summons were issued. At that time, also, your Honor signed, at the request of the plaintiff, a temporary restraining order restraining the various claimants from instituting or maintaining actions against the insurance company pending the decision of this Court upon the hearing of this interpleader action.

The prayer of the complaint is, of course, that the proper parties to receive the fund in question be determined by the Court, and that the amounts be paid to the proper [62] parties; that out of the fund in court, however, the costs of this action incurred by the plaintiff necessarily in doing its part to make it possible to solve the disputes between the parties be returned to the plaintiff, and that also out of the fund the plaintiff be allowed such sums as are determined by your Honor to be reasonable for the plaintiff's attorney fees in the action.

The other prayer of the complaint is that upon the entry of the final decision in this interpleader action, the temporary restraining order be made permanent against all parties, including, of course, the successful party, because the judgment has already been paid, in effect.

The Court: I don't remember now, is there any statutory provision for attorney fees in an interpleader action?

Mr. Greenough: On that subject, anticipating possibly some question about it, we have prepared a

brief and memorandum of authorities and that has been served upon all counsel.

The Court: I see, all right.

Mr. Greenough: It doesn't purport to contain all the cases at all. There are hundreds of them.

I also in that connection have served just this morning or handed to counsel a list of the out-of-pocket expenses that we have incurred here, and I hand a list of that to your Honor. [63]

The Court: All right.

Mr. Greenough: Now, then, Mr. J. K. White, will you stand so the parties can identify you? Mr. White is the Branch Manager of the Spokane Branch Office of Sun Life Assurance Company of Canada. He is the head administrative man of the Sun Life Assurance Company's office in Spokane, and I might observe, your Honor, that the Spokane office was the office through which all of these policies involved were administered and handled during Mr. Weyen's life, so that the loans made and the premiums paid, and so on, all passed through the Spokane Branch Office and Mr. White has been Branch Secretary—I think I said manager; his title properly is Branch Secretary—he has been Branch Secretary of the Branch office for a long period and I think during all the time that any transactions under any of these policies occurred.

That is correct, is it not?

Mr. White: That is correct.

Mr. Greenough: Now, we have secured from the home office of the Sun Life Assurance Company in Montreal, Canada, originals of every document that

they have pertaining in any way to these policies or to the assignments, the loans, the changes of beneficiary, correspondence, anything relating to the subject before your Honor this morning. Mr. White has those with him here in court. We also have photostatic copies. Now, gentlemen, we just got those things through the mail and [64] Mr. White has been checking them this morning. He reports to me there are two items, of which we have photostatic copies, the originals of which he can't find in this envelope we just received from Montreal, but I am sure that we have them. If we don't, I think that perhaps the Court would let the photostatic copies in and subject to our later scurrying around and finding those two originals.

There is a great mass of documents, as your Honor will see when we get into the evidence, and it has been quite a chore to sort the things out and gather them.

Then, in addition to those materials from Montreal, Mr. White——

The Court: You say you have photostatic copies?

Mr. Greenough: We have originals of everything except two and I think we have originals of those, but if we don't have originals of those, we have photostatic copies.

The Court: Oh, I see. I was just going to say I suppose photostatic copies or some sort of copies could be substituted for the originals.

Mr. Greenough: Although we have no objection to these originals being marked as exhibits because

the Sun Life Assurance Company has no further need of them.

The Court: That's right, close the files as far as you are concerned.

Mr. Greenough: I anticipate when the judgment becomes [65] final and satisfied, the originals are going to be returned to us. There is no objection to that, is there, Max?

Mr. Etter: No.

Mr. Greenough: So for the time they will be in the possession of the Court, I think it would be speedier if we just let the originals go in.

The Court: Of course, it might not become final in this Court.

Mr. Greenough: That is true too, but that is all right with us.

Now, the other type of evidence that we have for the use of the Court and the parties here are the policy cards—is that the proper name for them, Mr. White?

Mr. White: Yes.

Mr. Greenough: Policy cards, which are maintained in the Spokane Branch Office covering these various policies. Now, those are the original records of the transactions which they show. Namely, they show the receipt of all premiums, they show the repayments of all loans, and we also have in court the originals of all checks of Sun Life Assurance Company by which loans were made on these policies. Those, of course, were endorsed by Mr. Weyen or other persons to whom the loan proceeds were paid in accordance with his request and cleared through

the bank and went back to the Sun Life Assurance Company. We have those. Now, I think that is the original [66] of everything that will have any bearing on the case. Mr. White, as I say, is here and I don't know how your Honor or counsel would like to proceed, but I can put him on the stand and have him identify all of these things right down the line, or we can simply let counsel go ahead and we will have them in court and if you want to look at any of these things, you can call on him then.

If the Court feels that it is proper and if counsel will agree, I would appreciate Mr. White's being called upon for any testimony that he might be needed for and then being excused. He is right here in Spokane and if he is wanted again, he can come back down here in ten or fifteen minutes, and I also would appreciate being excused myself, but I don't want to rush away from my duty and I am asking for an attorney fee here and I am willing to stay if it is necessary.

Mr. Etter: Your Honor, along with what Mr. Greenough says and the fact he would like to get away and Mr. White, too, I think it might be proper, if I understand properly, that is the way this will proceed, that all of these documents of Sun Life be identified and put in the evidence because I haven't seen some of them and I don't think other counsel have, and after they are put in evidence, we can have them here and if the Court wishes to suspend so we can all examine them, then we can expedite the trial. I don't know whether that was Mr. Greenough's plan. If that is so, I

think that is the proper [67] way to do it, and I certainly have no objection.

The Court: If there is no objection to it, I think an orderly way to proceed, Mr. Greenough, might be for you to put Mr. White on and show the amount of money that you have, under what documents it is submitted here as an interpleader, and then I see no reason why he couldn't be excused subject to calling him back if he is needed.

Mr. Greenough: We have only one list of some of these. Would it be permissible if I stand by the witness up there?

The Court: Oh, yes, you may do that.

J. K. WHITE,

called and sworn as a witness on behalf of the plaintiff, was examined and testified as follows:

Direct Examination

Q. (By Mr. Greenough): You are J. K. White?

A. Yes.

Q. What is your residence, Mr. White?

A. 423 West 20th, Spokane.

Q. By whom are you employed?

A. Sun Life Assurance Company of Canada.

Q. That is the plaintiff in this interpleader action? A. That's right.

Q. In what capacity are you employed by that company, Mr. [68] White?

A. Branch Secretary of the local branch.

Q. The local branch, that is the Spokane branch? A. Spokane branch.

Q. Mr. White, you have read the complaint in

(Testimony of J. K. White.)

this action, have you? A. Yes.

Q. And you are familiar with the life insurance policies involved here? A. I am.

Q. Were all those life insurance policies administered through the Spokane Branch Office of Sun Life Assurance Company of Canada?

A. Yes.

Q. Have you been Branch Secretary of the Spokane branch during the entire policy life of each of the policies involved here?

A. No. There was one issued in 1934 that was prior to my time in Spokane. The others, yes.

Q. And the others, yes. Now, when you assumed your duties in Spokane, were the branch records as to that policy which had been issued prior to your coming to Spokane, turned over to you by your predecessor as a part of the records of the branch kept in the regular course of business by the company? [69] A. Yes.

Q. And has that record since been in your custody? A. Yes, sir.

Q. And the records of all the other policies, of course, have been in your custody and these cards, and so on, have been kept by the employees of the company under your immediate supervision?

A. That is right.

Q. Now, Mr. White, you have before you quite a stack of documents pertaining to the policies in suit here? A. Yes.

Mr. Greenough: I guess I'd better have these marked first. I guess I hadn't better take a chance

(Testimony of J. K. White.)

of referring to them until they have all been marked.

The Court: No, I think perhaps you should have the Clerk mark them in the sequence that you desire, in the order that you wish.

Mr. Greenough: Well, does your Honor want me to take time to arrange these policies in the order in which they appear in the separate counts? They are more or less hit and miss now, I think.

The Court: If you think it would help in keeping them straight.

Mr. Rowan: If it please the Court, couldn't we stipulate that they could be marked beginning with A or 1 in [70] accordance with the way they are numbered in the complaint?

Mr. Etter: Certainly we can.

Mr. Greenough: I can do that in just a second here, I think, your Honor.

All right, will you mark that as the first, please.

The Clerk: Plaintiff's 1 for identification.

Q. (By Mr. Greenough): I am handing you, Mr. White, Plaintiff's Exhibit for Identification No. 1 and I will ask you to describe that to the Court.

Mr. Greenough: Of course, your Honor, all of these are life insurance policies of Sun Life Assurance Company of Canada. I think that needn't be repeated each time.

The Court: No.

Q. (By Mr. Greenough): Mr. White, if you

(Testimony of J. K. White.)

will give the number of the policy, the serial number of the policy.

Mr. Greenough: And also, counsel and your Honor, can it be understood that all of the policies, of course, are issued to Robert Francis Weyen or Robert F. Weyen, as the case may be, and that he is one and the same person?

The Court: Yes, all right.

Mr. Greenough: And they all cover his life.

Q. I think that is all you have to say as to each policy, Mr. White, is to give the number of it.

A. Policy 1,447,698.

The Court: I wonder if you would have him give the [71] amount of the policy?

Q. (By Mr. Greenough): All right, the principal amount of that policy, Mr. White?

A. Is \$1,000.

The Court: All right.

Mr. Greenough: Your Honor and counsel, that is the policy which is involved in Count No. 1.

Mr. Rowan: May it please the Court and counsel, couldn't it be stipulated that they are all double indemnity policies?

The Witness: Yes.

Mr. Greenough: That may be stipulated.

The Court: All of them double indemnity.

Mr. Greenough: They all are, yes, your Honor.

The Clerk: That will be Plaintiff's 2 for identification.

Q. (By Mr. Greenough): Mr. White, referring you now to Plaintiff's Exhibit No. 2 for identifica-

(Testimony of J. K. White.)

tion, will you give the serial number and the principal amount of that policy?

A. Policy No. 1,710,519 for \$1,000.

Mr. Greenough: Will that be admitted, your Honor?

The Court: Yes, I am going to admit these policies and all these documents. If anybody has an objection, they can speak up. Otherwise, I will admit them as they are identified. [72] 1 and 2 are admitted.

(Whereupon, the said policies were admitted in evidence as Plaintiff's Exhibits 1 and 2.)

Q. (By Mr. Greenough): Plaintiff's Exhibit No. 3 for identification, Mr. White?

A. Policy 1,755,413 for \$1,000.

The Court: That will be admitted.

(Whereupon, the said policy was admitted in evidence as Plaintiff's Exhibit 3.)

Q. (By Mr. Greenough): Plaintiff's Exhibit No. 4 for identification?

A. 1,852,251 for \$2,000.

The Court: It is admitted.

(Whereupon, the said policy was admitted in evidence as Plaintiff's Exhibit 4.)

Q. (By Mr. Greenough): Plaintiff's Exhibit No. 5 for identification, Mr. White?

A. Policy 1,861,700 for \$10,000.

The Court: That will be admitted. [73]

(Whereupon, the said policy was admitted in evidence as Plaintiff's Exhibit 5.)

(Testimony of J. K. White.)

Q. (By Mr. Greenough): And Plaintiff's Exhibit for identification No. 6?

A. 1,861,701 for \$10,000.

The Court: That will be admitted.

(Whereupon, the said policy was admitted in evidence as Plaintiff's Exhibit 6.)

Mr. Greenough: Your Honor, Exhibits 2 through 6 are the policies incorporated in the second count.

The Court: And 1 is the first count?

Mr. Greenough: The policy No. 1,447,698 is the first count.

The Court: I see, all right.

Mr. Greenough: And then policies which are exhibits 2 through 6 are all in the second count.

The Court: All right.

Mr. Greenough: Now, your Honor has probably observed that although there are numerous policies, I only have five counts in the complaint. That is because certain policies have exactly the same history as to title. [74]

The Court: I see.

Mr. Greenough: And my conception, at least, as to the entitlement to the proceeds thereof, and I grouped those all into one count. That is the reason in the second count, for example, there are five policies.

The Court: I was just curious to know why so many policies were taken out. Was it over a period of years?

A. Over a period of years, yes, from '34 to '54.

The Court: Oh, I see.

(Testimony of J. K. White.)

The Clerk: I have marked Plaintiff's 7 for identification.

Q. (By Mr. Greenough): Can you identify Plaintiff's Exhibit for identification No. 7?

A. Policy 1,919,863 for \$3,000.

Mr. Greenough: Exhibit No. 7, your Honor, is the policy which is involved in the third count of the complaint.

The Court: What was the amount of that again?

Mr. Greenough: \$3,000.

The Clerk: \$3,000.

The Court: \$3,000. That will be admitted.

(Whereupon, the said policy was admitted in evidence as Plaintiff's Exhibit 7.)

The Clerk: I have marked Plaintiff's Exhibit 8 for [75] identification.

Q. (By Mr. Greenough): Plaintiff's Exhibit for identification No. 8, Mr. White?

A. Policy 1,952,847 for \$5,000.

The Court: Admitted.

(Whereupon, the said policy was admitted in evidence as Plaintiff's Exhibit 8.)

Mr. Greenough: Exhibit No. 8 is the policy which is involved in the fourth count, your Honor, and that concludes the policies involved.

Now, I might observe, your Honor, that the total of the face amounts of those policies, of course, should be multiplied by two because of the double indemnity provision of each and then that total will

(Testimony of J. K. White.)

not equal the total which was tendered into court, will it?

A. No, from that is deducted the policy loans that were outstanding.

Q. At the time of the death? A. Yes.

Mr. Greenough: Now the manner in which the amount payable at the time of the death and at the time of the institution of this action upon each policy was computed and incorporated as Exhibit A to the complaint, so if your [76] Honor wishes to ascertain the exact computation of the amounts due under any particular policy and include it in the tender into court, your Honor will find that in Exhibit A to the complaint.

Q. Now, Mr. White——

The Court: Let's see, I intended to admit all of those, 1 to 8, inclusive, Mr. Taylor.

The Clerk: Yes.

The Court: May I make this inquiry, is there any question by any of the parties in interest here as to the amount that has been deposited? Is there any controversy between the claimants and the insurance company as to whether they have made a correct accounting here and a correct deposit of the balance due on these policies?

Mr. Etter: There is no controversy so far as the defendant Defenbach is concerned.

Mr. Arnold: We know of none.

Mr. Rowan: No.

The Court: I thought I might like to know that. All right, go ahead.

(Testimony of J. K. White.)

Mr. Greenough: Your Honor, I have here a sheaf, I would estimate it to be probably twelve or fifteen separate pages, which are the policy loan agreements pursuant to which loans were made at various times in various amounts on various ones of these policies, and I think it might be advisable, I [77] think it would be convenient, at least, to have those marked all as one exhibit.

Mr. Etter: No objection.

Mr. Arnold: No objection.

The Court: Yes, all right.

The Clerk: That will be Plaintiff's Exhibit 9 for identification.

The Court: It will be admitted.

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibit 9.)

Q. (By Mr. Greenough): Mr. White, you heard my statement to the Court and counsel as to the content of this Plaintiff's Exhibit for identification No. 9? A. Yes.

Q. Was that a correct statement?

A. That is correct.

Mr. Greenough: Now, your Honor and counsel, the next group of papers, again it is eight or ten pages I would guess, includes the claims or claimants' statements that were filed with the Sun Life Assurance Company of Canada by claimants' various claims, and also correspondence between various claimants or persons representing them and the Company after the death of the insured relating to entitlement to the proceeds [78] of various policies.

(Testimony of J. K. White.)

If there is no objection, I will mark that all as one exhibit.

Mr. Arnold: No.

The Clerk: It will be marked as Plaintiff's 10 for identification.

The Court: 10, that is?

The Clerk: Yes, sir.

Mr. Arnold: No objection.

Q. (By Mr. Greenough): Mr. White, you heard my statement to counsel and the Court as to the content of Plaintiff's Exhibit No. 10 for identification?

A. That is correct.

Q. That was a correct statement, was it not?

A. That was correct.

The Clerk: Is that admitted, your Honor?

The Court: I haven't seen these documents, of course, and as I understand from somebody's statement here, that counsel probably haven't either. I suggest this procedure: As these are offered, and certainly some of these are admissible in evidence, some of them may not be—there may be letters in there that are hearsay or self-serving that might not strictly be admissible—but I suggest that I admit them. Then if anybody has any objection to any of them, I will reconsider and consider taking them out or striking them from the exhibit. Is that acceptable? [79]

Mr. Etter: Yes.

Mr. Rowan: Just so we have the right to object to them on the ground of materiality, that is all.

The Court: Yes, I will give you that opportunity

(Testimony of J. K. White.)

after you have examined them, but I think we ought to put them all in now, with the understanding that after you examine them, if you object to any of them, you can make your objection and then I will consider them on an individual basis.

Mr. Etter: That will be acceptable.

The Court: It will be admitted on that qualified basis, then, No. 10.

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibit 10.)

Mr. Greenough: Well, now, your Honor, I have three groups of documents. They have been stapled into three groups. Mr. White tells me there is no significance to that, however, they could as well be stapled all into one bunch. They are all documents from the home office of Sun Life Assurance Company of Canada. They are assignments, copies of trust agreements, requests for changes of beneficiary, and correspondence relating to those subjects and kindred subjects. Some of the correspondence are originals received by Sun Life Assurance Company of Canada from various writers, and other [80] correspondence are copies of Sun Life's responses, and so on.

Now, these relate to all of the policies; that is, for example, there are some assignments that relate only to a single policy; other assignments relate to three or four policies. It would be impossible to separate these, in other words, into one group which related only to one policy. Subject to the ruling that your Honor made on Exhibit No. 10 as to objec-

(Testimony of J. K. White.)

tions for materiality, and so on, being reserved, I think it would be perfectly appropriate to offer these all as one exhibit.

The Court: Very well, you may offer it on that same basis then and they will be admitted as No. 11.

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibit 11.)

Q. (By Mr. Greenough): Mr. White, you heard my statement to the Court and counsel describing the content of this combined Exhibit No. 11, I might call it, a sheaf of documents approximately half an inch thick. Did I in my statement to his Honor properly describe the content of that exhibit? A. You were correct.

The Clerk: I have marked Plaintiff's Exhibit 12 for identification. [81]

Q. Mr. White, inviting your attention to Plaintiff's Exhibit No. 12 for identification, will you describe that, please, just by the name of the addressee, the name of the writer, and the date?

A. This is a declaration signed by Robert Francis Weyen on the 30th day of November, 1953 referring to Policy 1,918,865.

Q. And addressed to?

A. The Sun Life in Montreal.

Mr. Greenough: Your Honor and counsel, this is a photostatic copy of one of the two documents which I stated earlier we had not been able to find among the originals sent to us from Montreal, but which obviously the company had and perhaps still has, although it may show up among this Exhibit

(Testimony of J. K. White.)

11 which has just been admitted, it may be in there, the original, but if it isn't, here is a photo-static copy of it which was sent to me from Montreal at the time the case was sent to me for filing. Now, it is not the original but it does bear upon this subject and it is a document which I think should be in the chain of title documents for consideration by your Honor and by counsel.

Mr. Etter: No objection, your Honor.

Mr. Rowan: No objection.

Mr. Arnold: No objection.

The Court: If there is no objection, it will be [82] admitted as Plaintiff's Exhibit 12.

(Whereupon, the said document was admitted in evidence as Plaintiff's Exhibit 12.)

The Clerk: I have marked Plaintiff's Exhibit 13 for identification.

Mr. Greenough: Now, Plaintiff's Exhibit No. 13 for identification, your Honor, is the second of those two documents.

Q. Will you explain what that is, Mr. White?

A. This is a letter dated May the 21st, 1955 from Ralph B. Defenbach, Trustee for R. F. Weyen, inquiring about when the claim would be paid.

Q. And that was addressed to J. K. White, Branch Secretary? A. Yes.

Mr. Greenough: I will offer 13 likewise.

Mr. Etter: No objection.

Mr. Rowan: With the same reservation.

The Court: Yes. It will be admitted, then, sub-

(Testimony of J. K. White.)

ject to the objections that may be made as to its materiality and admissibility otherwise.

(Whereupon, the said document was admitted in evidence as Plaintiff's Exhibit 13.) [83]

The Clerk: I have marked Plaintiff's Exhibit 14 for identification.

Q. (By Mr. Greenough): I am handing you Plaintiff's Exhibit 14 for identification, Mr. White. Will you describe it, please?

A. This is a policy record card for Policy 1,447,-698. It contains the entire history of the policy.

Q. And that policy record card is originally instituted and maintained where, Mr. White?

A. In the Spokane branch.

Q. And comes from your possession as Branch Secretary of the Spokane Branch?

A. That is correct.

Q. And that refers to what? You gave the number of the policy, didn't you?

A. Yes, I did.

Q. Now, there are two record cards in Exhibit for identification No. 14, Mr. White. I assume that is because the history of this one policy ran over the first card and you started the second card as a continuation of the first? A. That is correct.

Mr. Greenough: I will offer that, your Honor.

The Court: If there is no objection, it will be admitted, then, 14. [84]

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibit 14.)

(Testimony of J. K. White.)

The Clerk: The next one is marked Plaintiff's Exhibit 15, your Honor, for identification.

Q. (By Mr. Greenough): Plaintiff's Exhibit No. 15 for identification, Mr. White, is the same policy record card from the Spokane Branch Office relating to Policy No. 1,710,519? A. Correct.

Q. And again that constitutes two cards?

A. Yes.

Mr. Greenough: Offer Plaintiff's identification No. 15, your Honor.

The Court: It is admitted.

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibit 15.)

The Clerk: The next one will be 16, your Honor, and I am also marking 17, 18 and 19.

Q. (By Mr. Greenough): Now, Exhibit for identification No. 16, Mr. White, is the policy record card from your office covering Policy No. 1,755,413 and that constitutes [85] two cards?

A. Correct.

The Court: That will be admitted.

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibit 16.)

Q. (By Mr. Greenough): Mr. White, Exhibit for identification No. 17 is the office policy card covering Policy 1,852,251 and that constitutes two cards? A. Correct.

The Court: Admitted.

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibit 17.)

Q. (By Mr. Greenough): Plaintiff's Exhibit 18

(Testimony of J. K. White.)

for identification is the branch policy record card for Policy 1,861,700 and it consists of two cards?

A. Yes.

The Court: It is admitted.

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibit 18.)

Q. (By Mr. Greenough): Plaintiff's Exhibit for [86] identification No. 19 is the policy record card for Policy 1,861,701 and it consists of two cards?

A. Correct.

The Court: Admitted.

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibit 19.)

Mr. Greenough: If your Honor please, Exhibit No. 14 was the policy record card for the policy which is involved in count one; exhibits 15 through 19 are the policy record cards for the policies involved in count two.

The Clerk: Marking Plaintiff's Exhibits 20 and 21.

Q. (By Mr. Greenough): Plaintiff's Exhibit for identification No. 20, Mr. White, is the policy record card for Policy No. 1,919,863 consisting of two cards?

A. Correct.

The Court: Admitted.

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibit 20.)

Mr. Greenough: That exhibit for identification No. 20, your Honor, involves the policy which is the subject of count number three. [87]

The Court: All right.

(Testimony of J. K. White.)

Q. (By Mr. Greenough): And Exhibit for identification No. 21, Mr. White, is policy record card for Policy No. 1,952,847 and that is only one card?

A. That is correct.

Mr. Greenough: That Exhibit No. 21 for identification, your Honor, is the policy record card for the policy involved in the fourth count.

The Court: It will be admitted.

(Whereupon, the said document was admitted in evidence as Plaintiff's Exhibit 21.)

The Clerk: Plaintiff's 22 for identification.

Q. (By Mr. Greenough): Plaintiff's Exhibit for identification No. 22, Mr. White, is a group of checks drawn by the Sun Life Assurance Company of Canada all attached together as one exhibit. Will you describe to the Court what those checks represent, please?

A. These checks are drawn on the Spokane & Eastern Branch and represent payment of a policy loan as requested by the insured, in various amounts and for the various policies.

Q. Now, Mr. White, you say that those checks are drawn upon the Spokane & Eastern Branch. You mean the Spokane & [88] Eastern Branch of the Seattle First National Bank? A. Correct.

Q. Here in Spokane. And were those drawn by the Spokane Branch Office?

A. No, these were drawn by the Head Office.

Q. At Montreal? A. At Montreal.

Q. Pursuant to applications for advances or loans on policies made by Mr. Weyen?

(Testimony of J. K. White.)

A. That's right.

Q. During his lifetime. And the policy loans, the applications for advances were approved then by the appropriate officials at Montreal and these checks issued by Montreal?

A. That is correct.

Q. Now, were they mailed to Mr. Weyen directly or were they mailed to you?

A. Through our branch, yes. We record them first and then mail them. And the assignment amounts will appear on the loan agreements that have already been admitted as an exhibit.

Q. In other words, the amounts of these checks which constitute exhibit for identification No. 22 will appear upon Exhibits 14 through 21, which are the policy record cards for the various policies? [89]

A. That is correct.

The Court: 22 will be admitted.

Mr. Greenough: I will offer Exhibit for identification No. 22.

The Court: It will be admitted.

(Whereupon, the said documents were admitted in evidence as Plaintiff's Exhibit 22.)

Mr. Greenough: I think, your Honor, that constitutes the offering and introduction of all of the records of Sun Life Assurance Company of Canada which can possibly refer to this dispute. And now Mr. White is available if anybody wants to ask him any questions, of course.

The Court: I wonder, would counsel prefer to cross examine Mr. White now or wait until you

(Testimony of J. K. White.)

have an opportunity to examine these documents? It occurs to me that some question might arise when you are looking at the documents that you will want to ask him to explain, and if he is gone, why then we would have to call him back.

Mr. Etter: I think probably it will be necessary.

The Court: I suggest that I take a fifteen to twenty minute recess and I will just recess subject to call, and when you gentlemen get through looking at these documents, as soon as you can conveniently, let me know and I will come back [90] on the bench and we will resume.

I will just recess subject to call.

(Whereupon a short recess was taken.)

The Court: All right, Mr. White, take the stand.

The Witness: Thank you.

The Court: Now, let's see, I suggest that you cross examine in the order in which your clients' names appear on the caption here. That is one way to do it so we will be going in the same order each time.

Mr. Rowan: I believe, if the Court please, then Mrs. May would come first as long as Mary Weyen isn't—

The Court: Yes, all right.

Mr. Rowan: At this time, anyway, I hand the Court my memorandum of authorities.

The Court: Yes.

Mr. Rowan: And serve a copy upon counsel.

Cross Examination

Q. (By Mr. Rowan): Mr. White, the Sun Life

(Testimony of J. K. White.)

has a printed form which it uses for change of beneficiary, do they not? A. That's right.

Q. That form is printed on a green sheet?

A. Green or buff, depending on the policy issue.

Q. I see. I notice in Exhibit 11 you have a request for change of beneficiary signed by Robert Weyen to Stanfill [91] which is about the date of the Stanfill trust, September 23, 1953?

A. Yes.

Q. And I believe you have such a request for change of beneficiary from Mr. Weyen to Mr. Stanfill for all of the policies, have you not?

A. I believe so, yes.

Mr. Greenough: Your Honor, I have no doubt but what Mr. Rowan is reciting in his questions to the witness is correct, but if it is important that Mr. White verify these various facts, I think it might be well for him to examine the exhibits himself.

Mr. Rowan: Certainly.

Mr. Greenough: If you have it in mind, Mr. White, so you are positive of your answer without looking at the exhibit, of course, that is O.K.

Mr. Rowan: Thanks for calling it to my attention. I don't need the exhibit anyway.

The Court: If you feel you can answer from memory, that is quite all right, but if you need to consult a document——

A. I think it would be better.

Mr. Rowan: I am asking him so far as he knows, anyway, if the Court please.

(Testimony of J. K. White.)

Q. Did the company ever to your knowledge receive any such [92] request for change of beneficiary signed by Mr. Stanfill to anyone else after he was designated as trustee for the children?

A. No.

Q. Now, I believe in one of the exhibits I saw a letter from Mr. Weyen, the deceased, to the company stating it was his intention to change the beneficiary. Do you recall such a letter in one of the exhibits? A. Yes, November——

Q. In what exhibit?

A. November 30, 1954.

Q. In which exhibit is that? A. 11.

Q. Was that ever followed through by completion of change of beneficiary? A. No.

Mr. Rowan: That is all.

Cross Examination

Q. (By Mr. Etter): Mr. White, in examining Exhibit 1, you will note that a request for change of beneficiary is attached to the policy?

A. Yes, sir.

Q. In Exhibit No. 2, I note that there is not only a request for change of beneficiary, but likewise there is filed an [93] assignment for value?

A. Yes.

Q. And in No. 3, I find the same thing, request for change of beneficiary and likewise an assignment for value. Referring to 2 and 3, the request for change of beneficiary has been made by Mr. Weyen, change of beneficiary to Mr. E. J. Stanfill as trustee? A. That is right.

(Testimony of J. K. White.)

Q. Both of the assignments for value are assignments to Mr. Defenbach as trustee?

A. No, no, they are assignments in favor of Mr. Weyen.

Q. Oh, of Mr. Weyen.

The Court: I don't get that in favor——

Mr. Greenough: Completed by Mary Weyen.

A. Mary Weyen.

Mr. Etter: That is correct in 2 and 3, excuse me.

A. That's right.

Q. Now, in the other policies that are here, I note that in some of them or all of them, referring now to No. 4, I find no request for change of beneficiary or assignment in the policy? A. No.

Q. There is none there? A. No.

Q. Or in 5? [94] A. No.

Q. Or in 6? A. No.

Q. Or in 7? A. No.

Q. Or 8? A. That's right.

Q. Now, referring, however, to Exhibit No. 11, those requests or assignments are all present, are they not, in No. 11? A. They are.

Q. Can you tell me any reason in explanation of the fact that on some of these exhibits they are attached and others they are kept separate, as you have in Exhibit 11?

A. In the earlier policies, it was a requirement that the change of beneficiary be endorsed on the contract. In the later issues, that was not necessary.

Q. Has that any significance?

A. Not at all.

(Testimony of J. K. White.)

Q. Not at all. Does the fact that the assignments are not attached to the policies have any significance? A. No, not at all. That is customary.

Q. You said, I think, in answer to counsel's question, that there had not been a change of beneficiary other than the requested one with respect to Mr. Stanfill as trustee? [95]

A. That I would have to look at the exhibit to make certain. Are you referring to a change of beneficiary completed by Stanfill?

Q. Yes, other than that, was there any change of beneficiary ever indicated in any request from Mr. Stanfill? A. No.

Q. There was not?

A. There is nothing signed by Mr. Stanfill, or, at least——

Q. Can you tell me whether or not Mr. Stanfill, after he was made beneficiary, did make assignments of these policies?

A. I would have to refer to the exhibit to make certain. Yes, Mr. Stanfill and Mr. Weyen joined in naming Mr. Defenbach as trustee.

Q. In an assignment?

A. In an assignment for value.

Q. Which was filed?

A. Which was recorded by the company.

Q. Recorded by the company. What effect did the assignment for value, so far as your company was concerned, have, Mr. White, as to ownership of policies?

(Testimony of J. K. White.)

A. Well, I think that that would be a legal question that I am not qualified to answer.

Q. I see. But you filed the assignment, did you not? A. We recorded it, yes.

Q. Do you know whether or not as to Policy No. 1,447,698, [96] which was the policy I think assigned to Elfrieda May, do you know whether or not Mr. Stanfill made the assignment with respect to that policy, also?

A. I believe so. To be certain, I would have to refer to the exhibit.

Q. Would that be in 11, do you know?

A. Yes, yes.

Q. That is correct? A. That is correct.

Q. I see. That was as to 1,447,698 to Elfrieda May? A. That's right.

Q. That is after, of course, the creation of the so-called Stanfill trust? A. Yes.

Mr. Etter: That is all.

Cross Examination

Q. (By Mr. Arnold): Mr. White, referring you to Exhibit 8, you will note on the face thereof that it is payable to E. J. Stanfill as trustee under trust agreement dated the 19th of October, 1953.

Now, Mr. White, were you familiar with a document which was mentioned a moment ago as the so-called Stanfill trust? A. Yes. [97]

Q. Had you seen it? A. Yes.

Q. Do you recall the date of the instrument?

A. September the 23rd, I believe.

(Testimony of J. K. White.)

Q. Did you ever see a trust agreement dated the 19th of October, '53? A. No.

Q. Will you explain to the Court for the purpose of the record the discrepancy there and what subsequently happened relative to information sent to your office, if any?

A. We received a letter stating that the October 19th date was incorrect and that the correct date was September the 23rd.

Q. Do you know of your own knowledge whether that letter is incorporated in any of these exhibits?

A. I am not sure.

Q. Well, you do recall of your own knowledge that such a letter was received? A. Yes.

Q. And was it the company's intention to refer to that trust agreement of September 23rd in this policy?

A. If I could have the policy card for that policy, it would appear there.

Q. I think, Mr. White, that in Exhibit 11 we find the letter [98] to which you refer?

A. Yes.

Q. Now, Mr. White, handing you all of these policy cards, which are exhibits 14 to 21, inclusive, I will ask you to give some summary information that I will request, which I think you can give much easier than we can dig it out of those records and argue it later.

What was the status, if any, of loans on the several policies involved in this litigation on Septem-

(Testimony of J. K. White.)

ber 23, 1953, the date of the Stanfill trust? That is, were the policies encumbered on that date?

A. 1,447,698 on that date had a loan of \$400.53; Policy 1,710,519, as of September, '53, had a loan of \$345.00.

Q. I will shorten this a little bit. Just tell us whether all of the policies were encumbered at that time or not, the amounts being immaterial for the present.

A. No, they were not.

Q. They were not?

A. Not all encumbered on that date.

Q. What ones were not?

A. 1,861,700, 1,861,701, 1,919,863, and 1,952,847.

Q. Very well. Then, of the eight policies, Exhibits 1, 2, 3, and 4 were encumbered at that time, and Exhibits 5, 6, 7, and 8 were not encumbered at that time?

Mr. Greenough: He didn't have the exhibit before. [99]

Mr. Arnold: That's right, I'm sorry. I will withdraw the question.

Q. Now, the next question, Mr. White, relative to those four that were encumbered at that time, were those loans subsequently paid and discharged subsequent to September 23, 1953?

A. No, sir.

Q. They have carried through until the present time?

A. Yes, sir.

Q. Those original loans?

A. Yes.

Q. Very well. Now, relative to the remaining

(Testimony of J. K. White.)

policies that were not encumbered at that time, were they ever subsequently encumbered?

A. Yes.

Q. At what time, what date?

A. February 21, 1955.

Q. In other words, is this a fair summary, that of the eight policies which are all now encumbered, four of them were encumbered at the time of the execution of the Stanfill trust on September 23, 1953, and that encumbrance continued to the present date, and the other four policies were subsequently encumbered in February of 1955 and that encumbrance continued until the present date?

A. Well, February the 21st, 1955, and there were additional [100] loans. The additional loans are March, '53, which was prior to the Stanfill trust, that's right.

Q. Mr. White, during the period that Mr. Etter was cross examining you, there was some discussion relative to assignments and changes of beneficiary. Are you in a position to tell the Court the difference between the two insofar as they relate, at least, to your Company and your policies?

A. No, assignments are something I am not entirely familiar with. But changes of beneficiary are, yes, merely where the policy holder asks for a change of beneficiary.

Q. Is an assignment equivalent to a change of beneficiary? A. No.

Mr. Arnold: That is all, Mr. White, Thank you.

(Testimony of J. K. White.)

Cross Examination—(Continued)

Q. (By Mr. Etter): What does the assignment constitute, then?

A. Well, I think that would be a question for the head office to decide.

Q. Well, what I mean is you said it wasn't equal to a change of beneficiary?

A. To the extent that the change of beneficiary always is a separate document. An assignment, that is a form the company doesn't assume any responsibility for the [101] validity of.

Q. That is true, but the assignment you don't assume my responsibility. What does it mean to you as an insurance man without giving us any law on it?

A. Well, it is recorded for what it may be worth.

Q. Doesn't change the ownership of the policy?

A. Well, there are various types of assignment and I would hesitate to say whether it actually would or would not.

Q. Does it act as a pledge, in your opinion?

A. No, it is usually security of some kind or the policy that is the pledge. It is the assignment that covers the pledge.

Q. The policy is the pledge, but the assignment covers it, is that correct? A. Yes.

Q. Does it establish new ownership in the policy as far as your company is concerned?

A. I don't think I am qualified to answer—

Mr. Greenough: Excuse me, the witness is about to say he is not qualified. I don't know whether it

(Testimony of J. K. White.)

is appropriate for me to make any objection here. I simply want to observe that counsel for at least two of the parties have been, I think, addressing questions to Mr. White which involve technical questions of law, for example, what is the effect of a change of assignment, an assignment, or a [102] change of beneficiary. Legally, I think that is a question of law for the Court. I don't object to Mr. White answering if he knows.

The Court: It is is sometimes difficult to draw the line between what is a subject of law and what is a subject of expert testimony on insurance procedure. It is a little difficult to draw the line. If he gets upon the domain the Court thinks is the law, I will not be influenced by his answers, you may be sure.

Mr. Etter: I might say, your Honor, that is what I had in mind and possibly Mr. White didn't understand, but I felt the same way, that as far as insurance procedure, I would like to have his view on his insurance procedure and if the Court thinks he is wrong, of course, that is a question of law.

Mr. Greenough: Well, of course, I think perhaps it would be relevant to ask Mr. White whether he has any position with Sun Life Assurance Company of Canada, that is, whether he is a man authorized or has the knowledge as to the company's policy or official view as to these various questions. I doubt very much if he has, but if he hasn't, why, I think he shouldn't be required to answer.

The Court: Well, if you feel at any time that

(Testimony of J. K. White.)

you are not qualified to or in a position to answer, you have a perfect right to say so, Mr. White, and I think you have done so.

A. I have said it. [103]

The Court: If it is a matter that has to do with the policy of your company that isn't within your control, say so.

Q. (By Mr. Etter): I might ask you this: When these policies through your company are pledged, do they use the same form of assignment that are in here? A. Yes.

Q. They do? A. Yes.

Q. Now I will ask you if you can answer this: After one of these pledges is made to the bank and one of these assignments is filed, as far as your company is concerned, who owns that policy?

A. Well, the question of assignment is sort of clouded and I always refer it to the head office who are better qualified to act on it.

Q. Well, I am assuming this, assuming there is no dispute like is involved here and I have the policy with your company and I go in and pledge it to a bank for a mortgaged loan or something like that, file an assignment, as this has been filed here, to the Spokane & Eastern, say, or some other bank and there is no argument about it at all and no contention, what is the policy as far as you are concerned and the experience you have had as to the ownership of that policy after the assignment is filed in favor of the bank? [104]

Mr. Rowan: If the Court please, I am going to

(Testimony of J. K. White.)

object to that unless he couples his hypothetical question, if it is such, with the statement that the beneficiary might be minors.

Mr. Etter: All right, I will say that.

A. Well, the assignment prevented the insured from borrowing on the policy or changing the beneficiary.

Q. The assignment prevents that?

A. Yes.

Q. That's right.

A. Without the knowledge and consent of the assignee.

Q. Who, in the case I gave you, was the bank?

A. That's right.

Mr. Etter: That is all.

The Court: Any other questions of this witness?

Mr. Rowan: I have one more.

The Court: All right.

Cross Examination—(Continued)

Q. (By Mr. Rowan): Calling your attention to the Plaintiff's Exhibit 11, Mr. White, will you refer to the requests for assignment, any one of them, signed by Mr. Stanfill? Is the word "trustee" affixed after his name? A. No.

Q. He signed individually. So far as you [105] know, did he do that in all his requests for assignment? A. Yes, I think that's right.

Q. And I believe you stated you do not find anywhere in the correspondence a request signed by

(Testimony of J. K. White.)

Mr. Stanfill individually or as trustee for a change of beneficiary of any of the policies?

A. That is correct.

Mr. Rowan: That is all.

Mr. Etter: That is all.

The Court: Any other questions of this witness?

Mr. Etter: That is all, your Honor.

The Court: If not, then I assume Mr. White may be excused. You will be available here, I assume?

A. Yes.

The Court: For the next day or two so we can call you during office hours.

(Witness excused)

The Court will recess then until 1:30.

Mr. Greenough: If your Honor please, may I ask, do you want me here this afternoon?

The Court: Well, not unless counsel do. I think you might be excused on the same basis as far as I am concerned. When it comes time to close this up and get your attorney fee, I assume you will want to be here, but up until that time, you may be excused. [106]

Mr. Greenough: I would like to be here then, yes, your Honor.

(Whereupon the trial in the instant cause was recessed until 1:30 o'clock p.m., this date.)

1:30 p.m., October 18, 1955

(The trial of the instant cause was resumed pursuant to the noon recess, all parties being

present as before with the exception of Mr. Greenough, and the following proceedings were had, to-wit:)

The Court: All right, proceed. I don't know who's next.

Mr. Rowan: If the Court please, I am next in order, but Mrs. May's defense will hinge upon the Stanfill trust and the surrounding circumstances of the will, and so on, and Mr. Stanfill is the client of Mr. Arnold and he has the authenticated copies on the Defenbach assignment for creditors. For that reason, I would like to defer my proof until those are admitted in evidence, but at this time I would like to suggest a trial amendment of two words at page 4 of my original answer.

At the bottom of the page in the third count, the last line, I would like to correct the first word "all" to [107] "many."

The Court: Oh, I see.

Mr. Rowan: The first word "all" to "many" and the next word "all" to "the." So it will read: "This defendant has paid many premiums upon the policies."

The Court: You may make that amendment and then the Clerk will write it in here.

Mr. Rowan: Thank you. I will defer until the exhibits are offered, then.

The Court: All right. Do you wish to proceed, then, Mr. Arnold?

Mr. Arnold: If the Court please, if it is agreeable and considering the chronology of certain events and the exhibits, I believe it would be proper,

if the Court would permit me, to make a brief statement on behalf of Mr. Stanfill's case as trustee and then call him and identify his documents and exhibits.

The Court: All right, you may do that.

Mr. Arnold: If the Court please, we have been obliged to cross examine the representative of the life insurance company and to some extent got things a little out of order. I am not going into any long background of these people except to say very briefly that Robert Weyen, the deceased in this case, at the time of his death was in his late thirties and a very successful logging operator and had [108] been since the early nineteen forties. He had made a lot of money. He operated in Idaho and Eastern Washington and Oregon and I think even had interests in Canada and California.

The Court: What kind of an operator did you say he was?

Mr. Arnold: Pardon?

The Court: I didn't get your statement as to what kind of an operator he was?

Mr. Arnold: Logging operations.

The Court: Oh, logging, yes.

Mr. Arnold: And buying and selling of timber, for which he had a knack. But in the early fifties, probably about the year 1952, his situation began to decline and his domestic situation began to decline. Now, whether one was brought on by the other, I don't know, or which one came first, I don't know, but actually simultaneously the situation deteriorated until the fall of 1953 when he

divorced his wife. At that time they had two small children, which brings us, I believe——

The Court: Is that Mary P. Weyen?

Mr. Arnold: Mary P. Weyen. Which brings us to the point of commencement.

On September 23, 1953, Robert Weyen did three very important things. First, he obtained on that day a decree of divorce from Mary P. Weyen and in that decree a confirmation of a property settlement agreement. [109]

The Court: I am not sure I got the date of that decree, pardon me?

Mr. Arnold: September 23, 1953.

Mr. Etter: It is the 22nd.

The Court: September 22nd?

Mr. Etter: It is not the 23rd, it is the 22nd of September.

The Court: Well, all right.

Mr. Etter: Here is a copy of the decree.

The Court: September 22nd.

Mr. Rowan: I think that is correct, September 22nd.

The Court: I don't know that one day would make any difference, but we may as well have it accurately here.

Mr. Arnold: On September 22nd he obtained a decree of divorce and approval of a property settlement agreement in that decree. The separation agreement will be offered I think as far as material here. It is probably important only for the fact that it made provisions for the future care, maintenance

and the support of the minor children, as, of course, did the decree approving the same, and also for medical attendance for these children if necessary.

On the following day, September 23, 1953, Weyen consummated the other two important acts. First, he caused to be prepared and executed what has been referred to this morning here as the Stanfill [110] trust in which he made Mr. E. J. Stanfill trustee under what we believe to be an irrevocable and voluntary trust for the benefit of the minor children of certain insurance policies which are listed in a schedule attached to that trust agreement and carried the provision for the same trust to apply to any subsequent policies which he might take out and make Mr. Stanfill beneficiary of.

On the same day, he executed his last will and testament, which provided, in substance, that he had heretofore provided through insurance policies on his life for the minor children and a stipulation leaving them a bequest in the event such policies should lapse or become void, which it will be our contention did not happen, and left the residue to a person outside the family. In that document, he named E. J. Stanfill as executor of his estate and he also named E. J. Stanfill as testamentary guardian over the children. I might add that, as Mr. White testified and the record will show, the beneficiary on the several policies involved in this litigation was at that time changed to Mr. Stanfill as trustee and referring to the trust agreement of September 23, 1953.

Sometime in 1954, the trust agreement was filed

of record and was recorded in the Auditor's Office in Asotin County, State of Washington.

In the fall of 1954, E. J. Stanfill withdrew from the practice of law and engaged in farming enterprises in nearby Oregon. At that time there [111] was a shift in the assistance being given Mr. Weyen necessarily in his logging operations from Mr. Stanfill to Mr. Defenbach, which brought about the execution of what we refer to as the Defenbach assignment for the benefit of creditors, which I presume counsel will in due time place in evidence.

Then, of course, followed this year in April the untimely accidental death of Mr. Weyen, and the Court, I think, is familiar from Mr. White's testimony of the general nature and extent of the insurance that was taken out and the fact there were loans on it and there were assignments and the like which will come forward in due time.

I think that is sufficient for an opening statement, but with the Court's permission, I will call Mr. Stanfill and identify these documents and mark them in evidence.

Mr. Etter: Your Honor, probably to have it all, I would like to add onto that statement.

The Court: Well, anyone who wants to may make an opening statement at this time and we will get them all out of the way, unless someone wishes to reserve his statement.

Mr. Etter: No, the one I will make is very brief.

The Court: If you wish to make a statement, you may at this time.

Mr. Etter: I think I should point out to your Honor that on the 19th of August of 1953, [112] Robert Weyen and his then wife, Mary Weyen, entered into the property settlement which is the subject of the decree of approval on September 22nd of 1953. In other words, about a month and several days prior to the time of the entry of the divorce decree, a property settlement was entered into between Robert Weyen and Mary Weyen which was approved by the Court's decree on the 22nd of September.

The Court: Where was the decree entered?

Mr. Etter: It was entered in Asotin County by Judge Jordan upon the application of Robert Weyen. Thereafter, and on the 23rd, as Mr. Arnold stated, there was executed by Mr. Weyen two instruments, one a will, and I am not going into the provisions of the will until it is in evidence, the other was the so-called Stanfill trust agreement that was mentioned. Thereafter, and on October the 7th of 1954, after the creation of the trust agreement, on October the 7th of 1954, there was executed by Mr. Stanfill an assignment and a transfer of one of the policies that was in the so-called irrevocable trust. That policy is the first one that is listed in the action of interpleader by Mr. Greenough. It is number 1,447,698. That policy was transferred at that time. In other words, on October the 7th of 1954, it was transferred to one of the present parties in the interpleader, Elfrieda May, who was the mother of Robert Weyen. That is that first policy. Thereafter, and I might say at this time, Mr. Weyen was [113]

then and had been for some time heavily in debt, both as to his operations and as to the equipment which he operated, well in excess of \$100,000, and that because of that situation and impending action by all of these creditors holding this money, an assignment of all the policies was executed. In other words, this was the second assignment of policies in the so-called trust, that was executed by Mr. Stanfill, and consequently, on or about the 24th day of October after the execution of the assignment to Mr. Defenbach as the trustee for creditors and the execution of that assignment, there was then assigned and transferred over or pledged, any way that you want to put it, all of the remainder of the policies, being 2 to 6 in the second count, and 3 and 4, the policies in the third and fourth counts; in other words, the balance of the policies originally in this particular trust, one of which had gone to Mrs. May in October, the rest of them then were transferred over by assignment with the Sun Life and were transferred over by the execution of Mr. Stanfill and Mr. Weyen himself, and that was the posture in which the facts were when Mr. Weyen was killed in an unfortunate accident in April, and that I think is probably the extent or rather rounds out the whole picture of actually what has occurred and I think the rest of it is probably as indicated by the circumstances and the documents themselves.

The Court: Do you have anything to add? [114]

Mr. Rowan: Not at this time, your Honor.

The Court: All right, proceed then, Mr. Arnold.

Mr. Arnold: Mr. Stanfill.

E. J. STANFILL

called and sworn as a witness in his own behalf, was examined and testified as follows:

Direct Examination

Q. (By Mr. Arnold): Mr. Stanfill, will you state your full name?

A. E. J. Stanfill.

Q. Where do you reside?

A. Enterprise, Oregon.

Q. How long have you resided in Enterprise, Oregon?

A. Since November 1st, 1954.

Q. What is your occupation there?

A. Farmer.

Q. How long have you been engaged in the occupation of farming?

A. Since November 1st, 1954.

Q. What was your prior occupation?

A. I was an attorney.

Q. Where did you practice?

A. Clarkston, Washington.

Q. How long did you practice at Clarkston, Washington?

A. Five years. [115]

Q. Prior to November 1st, 1954?

A. That's right.

Q. Were you acquainted with Robert Weyen?

A. I was.

(Testimony of E. J. Stanfill.)

Q. Did you represent Robert Weyen in a divorce action, Robert F. Weyen against Mary P. Weyen?

A. I did.

Q. In Asotin County, State of Washington?

A. That is correct.

Mr. Arnold: Your Honor, there being two defendants, different defendants, that will introduce exhibits, I am wondering what would be considered the most feasible plan for numbering? We now have Plaintiff's 1 to 22, inclusive.

The Court: Well, we follow the practice here of numbering them consecutively, regardless of who offers them, so we will just put defendant's name and continue the numbers on up.

Mr. Arnold: That would be Stanfill's 23, then, for identification.

The Court: Defendant Stanfill's 23?

The Clerk: Yes, your Honor.

Q. (By Mr. Arnold): Mr. Stanfill, I will hand you here Defendant Stanfill's Exhibit 23 for identification, and ask you what it is?

A. It is a final decree of divorce and a [116] property settlement agreement.

Q. And does it bear the formal authentication on the cover sheet? A. It does.

Mr. Arnold: If the Court please, I will offer in evidence Defendant Stanfill's identification 23, being an authenticated copy of the separation agreement and the decree of divorce approving the same.

Mr. Etter: No objection.

The Court: It will be admitted, then.

(Testimony of E. J. Stanfill.)

(Whereupon, the said document was admitted in evidence as Defendant Stanfill's Exhibit 23.)

Mr. Arnold: Mark this Defendant Stanfill's Exhibit 24.

The Clerk: Marking a copy of the will as Stanfill's Exhibit 24, your Honor.

Mr. Arnold: And mark that trust agreement as 25.

The Clerk: Copy of the trust agreement is marked as Stanfill's 25, your Honor.

Q. (By Mr. Arnold): Mr. Stanfill, handing you Defendant Stanfill's Exhibit 24 for identification, can you identify that document?

A. It is the last will and testament of Robert [117] F. Weyen.

Q. Is it authenticated? A. It is.

Q. From what court and jurisdiction?

A. Tenth Judicial District Court, Nez Perce County, Idaho.

Q. Do you know of your own knowledge that that will is in the course of administration or probate in the state of Idaho? A. It is.

Q. Are you qualified and acting as the executor thereof? A. I am.

Mr. Arnold: If the Court please, I will offer in evidence Defendant Stanfill's identification 24, being an authenticated copy of the last will and testament of Robert F. Weyen.

Mr. Etter: No objection.

The Court: It will be admitted.

(Testimony of E. J. Stanfill.)

(Whereupon, the said document was admitted in evidence as Defendant Stanfill's Exhibit 24.)

Q. (By Mr. Arnold): Handing you Defendant Stanfill's Exhibit 25 for identification, I will ask you what that document is?

A. Trust agreement between Robert F. Weyen and E. J. Stanfill. [118]

Q. Is it authenticated? A. It is.

Q. Are you the E. J. Stanfill that is named in that agreement as trustee? A. I am.

Q. And has that agreement ever been recorded?

A. It was.

Q. Where?

A. In the Auditor's office of Asotin County, Washington.

Q. On what date? A. June 24, 1954.

Mr. Arnold: If the Court please, I will offer in evidence Defendant Stanfill's Exhibit 25, being a certified copy of the Stanfill trust to which reference has been made previously today.

Mr. Etter: No objection.

The Court: No objection, counsel?

Mr. Etter: No objection.

The Court: It will be admitted.

(Whereupon, the said document was admitted in evidence as Defendant Stanfill's Exhibit 25.)

Q. (By Mr. Arnold): Mr. Stanfill, were you named as guardian of the persons of Robert F. Weyen's two minor children in his last will [119] and testament?

A. I was.

(Testimony of E. J. Stanfill.)

Q. Have you qualified as such? A. Yes.

Q. Where do those children reside?

A. In Clarkston, Washington.

Mr. Arnold: Mark this, please, twenty whatever it is.

The Clerk: Defendant Stanfill's Exhibit 26.

Q. (By Mr. Arnold): I hand you Defendant Stanfill's Exhibit 26 for identification and ask you what that is?

A. Letters of guardianship in the matter of guardianship of Daryl Weyen and Carolyn Weyen.

Q. Is that certified? A. It is.

Q. By whom?

A. The Clerk of Asotin County.

Mr. Arnold: I will offer in evidence Defendant Stanfill's Exhibit 26 or identification, being a certified copy of letters of guardianship.

Mr. Etter: No objection.

The Court: It will be admitted.

(Whereupon, the said document was admitted in evidence as Defendant Stanfill's Exhibit 26.)

Q. (By Mr. Arnold): Now, Mr. Stanfill, referring to [120] Defendant Stanfill's Exhibit 25, the trust agreement, is there a schedule of policies attached to that agreement, policies of life insurance?

A. There is.

Q. At the time of or shortly after the execution of that agreement, were the policies listed thereon delivered to you?

(Testimony of E. J. Stanfill.)

A. They were in my office prior to the execution of this agreement.

Q. Were the beneficiaries changed to you at any time within your knowledge?

A. Well, we had made requests for changes, but I don't know whether they were changed or not from my own personal knowledge other than today.

Q. Well, I think the record on those policies is in and I will not test your personal recollection then.

You state, however, the policies were in your office? A. They were in my office at one time.

Q. Now, at any time subsequent to that, did you ever request to the Sun Life Assurance Society or sign a request to the Sun Life Assurance Society to change the beneficiary of those policies or any of them? A. No.

Q. Now, Mr. Stanfill, I believe you stated that you left [121] Clarkston and went into farming about November 1st, 1954? A. That's right.

Q. Had you been acting as Mr. Weyen's attorney up to that time?

A. I think I handled most of his legal work in Washington up until the first of October, 1954.

Q. Did you notify Mr. Weyen that you were going to withdraw from practice?

A. Yes, the first part of October, I advised him to get another attorney, that I wouldn't be available to continue his legal work.

Q. Did you transfer any papers or documents to

(Testimony of E. J. Stanfill.)

any other attorney or person in connection with that move? A. Not to my recollection.

Q. Your office in Clarkston was taken over by another attorney, was it not?

A. That is right.

Q. And your files remained substantially intact there? A. That's right.

Q. And on frequent occasions, you dropped into that office after your retirement to take care of any necessary business? A. Yes.

Q. Did you ever have any conversations with Mr. Defenbach about Mr. Weyen's affairs at about that time? [122]

A. Not to my recollection.

Q. Did you have any conversation with Mr. Keeton about Mr. Weyen's affairs?

A. I think that Mr. Keeton called me over the phone shortly after I had told Mr. Weyen to get another attorney, and wanted to verify a balance due on the creditors' schedule.

Q. What do you mean by creditors' schedule?

A. Well, there was a credit pool arrangement made out and at the time I left I was acting as a manager of that pool for Weyen's creditors and that was the primary reason for my telling Weyen to get somebody else so they could carry out that pool arrangement.

Q. Well, what do you mean as manager of the pool? What did you do in that capacity?

A. Well, I would receive the money due Weyen from the sawmill and make disbursements to the

(Testimony of E. J. Stanfill.)

various creditors listed pro rata as the money came in.

Q. How long had that been in operation?

A. I believe I made one disbursement, I think a matter of six weeks or two months before I left.

Q. And did you have a balance on hand that belonged to Mr. Weyen?

A. No, I disbursed whatever I received. I disbursed pro rata the whole thing. [123]

Q. To what, then, did you refer when you said Mr. Keeton called you to verify a balance?

A. As I recall, he asked me what my balance was in this credit pool. I was a party to it for back attorney fees.

Q. Oh, I see. Verifying the balance due you as a creditor?

A. As a creditor in that pool. That is my present recollection of it.

Q. Did you ever sign any document whatever after September 23, 1953 in your capacity as trustee under Defendant's Exhibit 25, the trust agreement?

A. Not to my recollection.

Q. Did you ever sign any as an individual?

A. I believe I did.

Mr. Arnold: You may cross examine.

Cross Examination

Q. (By Mr. Etter): Mr. Stanfill, when you talked with Mr. Keeton about your claim in the pool, he advised you what was happening in Idaho, did he not, and of the creation of what they called

(Testimony of E. J. Stanfill.)

the Defenbach pool or arrangement at Lewiston?

A. He told me they were setting up a new pool arrangement.

Q. That is correct. He told you, did he not, that there were a lot of additional creditors in Idaho involved? A. I believe he did.

Q. And that the amount of the indebtedness of Mr. Weyen was [124] very large?

A. Well, we both knew that. If he told me, we knew it anyhow. He may have said that.

Q. Did he talk with you at that time or at any later time about the insurance policies that are involved in this particular litigation?

A. Not to my recollection.

Q. Beg your pardon?

A. Not to my recollection.

Q. Did you talk to him in his office any time about them? A. I don't recall it if I did.

Q. Well, referring now to Exhibit No. 11 and this particular sheet which is entitled "Assignment for Value," you recognize your signature there?

A. I do.

Q. Do you know where that was signed?

A. As I recall it, it was in my office.

Q. Was Mr. Paul Keeton present? A. No.

Q. Was it signed in your office or was it signed in Mr. Keeton's office?

A. As I recall, it was mailed to my office and I stopped in from the ranch and Mr. Moore said, "There are some papers Keeton wants you to sign," and I just looked down and saw Bob's signature

(Testimony of E. J. Stanfill.)

and signed it and left it [125] there. That is my recollection.

Q. Was there a covering letter from Mr. Keeton with respect to the purpose? In fact, how did you know about signing this particular document, which is an assignment for value of the numbered policies that appear on the back of the document? How did you know you were supposed to sign that?

A. I didn't know that, but I did know that I had asked Bob to get somebody to carry on and as I come in I signed whatever papers were in the office. This was there, and I signed it.

Q. Well, didn't you know what it was?

A. Well, to be right frank with you, I didn't pay too much attention.

Q. Didn't you read it?

A. Well, I don't recall reading it.

Q. And do you know what it is now?

A. Yes.

Q. What is it?

A. I know what it purports to be.

Q. What is it? A. An assignment.

Q. Of what?

A. Of these numbered policies.

Q. And you didn't know that until today? [126]

A. I don't recall. In fact, I didn't know until the other day that I had even signed. I mean, I didn't remember that.

Q. You never had any discussion with Mr. Keeton about it? A. No, sir.

The Court: What is that date?

(Testimony of E. J. Stanfill.)

Mr. Etter: 24th day of November, 1954.

Q. So your testimony here, Mr. Stanfill, is that you didn't know why you signed it or what it was when you signed it and didn't pay any attention to it?

A. That is substantially it, all right. I hate to admit it, but I really didn't.

The Court: I haven't had the benefit of examining these documents as closely as you gentlemen. Who is it to?

Mr. Etter: This is an assignment for value.

The Court: From Stanfill to whom?

Mr. Etter: From Stanfill and Robert F. Weyen to Ralph B. Defenbach, trustee.

The Court: All right. Yes, I see.

Mr. Etter: That is what it is.

Q. Now, referring again——

Mr. Etter: If the Court please, this is Exhibit 11 again. This is likewise another assignment for value which is dated the 7th day of October of 1954, in which there is an assignment by Robert Francis Weyen and E. J. Stanfill of [127] Policy No. 1,447,-698, which is the policy in count 1 of the interpleader, an assignment to Elfrieda May of 857 North Haworth, Los Angeles 48, California.

Q. Directing your attention to this assignment, I will ask if you recognize your name there?

A. I do.

Q. Where was that signed?

A. That could have been signed in Keeton's office. I recall going to his office one time and that

(Testimony of E. J. Stanfill.)

could have been signed there, but I don't recall where and when I signed it, but I admit that is my signature.

Q. Well, do you know what that was?

A. I do now.

Q. Well, I mean don't you recall that you made an assignment of one of the policies that you were then holding supposedly in the irrevocable trust or purported trust?

A. I don't recall, I assume that I must have read that. But I don't recall any circumstances around it, whether any discussion was ever had about it, I just don't recall it.

Q. I will ask you whether or not you recall whether you, in addition to signing, putting your signature on this assignment, that is, to Mrs. Elfrieda May and the assignment which I just pointed out to you to Ralph B. Defenbach, trustee under that certain assignment so and so, if you not only signed those two but that if you [128] don't recall that you also signed a policy that is not in issue here but which was in the trust, being No. 1,937,-383, a policy in the Macabees of Detroit, Michigan, for \$3,000, if you do not recall that you also signed an assignment in the same fashion that you have signed these two to Mr. Defenbach in that policy?

A. I don't recall unless it was done at the same time that this was signed. There may have been two instruments that I signed at the same time.

Q. Yes, but you recall, do you not, that in your trust arrangement that you entered into with Mr.

(Testimony of E. J. Stanfill.)

Weyen, you held this numbered policy in the Macabees, Detroit, Michigan, for \$3,000? That was part of your trust?

A. I knew that these several policies were in that trust. No particular one, I knew there was ten or so.

Q. And do you recall, or do you not recall, that you likewise made an assignment by signature of this policy that I am asking you about, the Macabees, besides these policies here?

A. I don't recall making any assignment on the Macabees or any other other than what I signed at that time. Nobody had said anything to me about assigning policies. No policies were shown to me.

Q. There are likewise two other policies that you had in your trust agreement with the Mutual Benefit of Omaha, [129] Nebraska. There were two policies, one for \$2,500 and one for \$5,000. Will you tell me now whether you executed assignments by signature in the same fashion on those two Omaha policies as you did on the policies which I have pointed out to you in Plaintiff's Exhibit No. 11?

A. I didn't know the policies existed. If I signed them, I didn't know about them.

Q. Beg your pardon?

A. They are not in my trust, I didn't know about them. I didn't have possession of these policies after I was made trustee.

Q. Beg your pardon?

A. I didn't have possession of the policies.

Q. After you were made trustee?

(Testimony of E. J. Stanfill.)

A. Just to make the transfers. I don't know who had them, whether Bob Weyen had them or where they went. It is hard for me to say what policies I signed for, if any.

Q. You don't recall whether or not you executed assignments on those policies? A. No.

Q. Or the Macabees policy, you don't recall that?

A. No. I mean I couldn't distinguish one policy from another just by number.

Q. But you do recall that this is your signature?

A. That's right. [130]

Q. On the assignment of this policy numbered 1,447,698 to Elfrieda May of Los Angeles on October 7th, 1954, and you do recall that this is your signature on the rest of the policies that you had in the trust, excluding the Macabees, to Mr. Ralph B. Defenbach, which also appears here?

A. I recall signing this paper, but I don't recall the contents of it.

Q. Well, did you know what the paper was for?

A. No, nobody said anything to me.

Q. Beg your pardon?

A. Nobody said anything to me about it. Keeton didn't, Weyen didn't.

Q. You never talked to Mr. Keeton about the purpose of your signing those assignments?

A. No.

Q. Never talked to Mr. Keeton about the purpose of signing the one to Elfrieda May?

A. I can recall going into his office. Whether it was to sign the Elfrieda May or something else, I

(Testimony of E. J. Stanfill.)

don't know. As I recall, I was in his office once from the time I left until after this series of events.

Q. Well, after this trust arrangement was signed, you, as I gather it, didn't exercise any control over the policies [131] at all?

A. The policies, as I recall, were sent over to Homer Lipps, or he came over to pick them up. He is the agent down there and they were to make the transfers and, as far as I recall, they never got back to my office.

Q. In other words, as I gather it, it was sometime in September or October of 1953?

A. Yes, I think that would be right.

Q. And you never saw the policies after that?

A. I don't recall ever seeing them back——

Q. Beg your pardon?

A. I don't recall ever getting them back to my office, unless they came back and they took them to apply for a loan or something, but I know this, they weren't there when I quit.

Q. You didn't have any control nor did you exercise any, over those policies, is that correct?

A. Well, there was none to exercise.

Q. Beg your pardon?

A. There was nothing to exercise that I could see.

Q. I see.

Mr. Etter: I think that is all. Do you have any other questions?

Mr. Arnold: If the Court please, may I ask one or two more questions of the witness? [132]

(Testimony of E. J. Stanfill.)

The Court: All right.

Redirect Examination

Q. (By Mr. Arnold): Referring, Mr. Stanfill, to the creditors' pool of which you were manager for Mr. Weyen prior to your retirement from the practice of law, were any of these insurance policies in any way involved in that creditors' pool?

A. No.

Q. There was no connection between that pool and the trust agreement, which is Exhibit 25?

A. No.

Q. Further, you will note that the instrument you did sign has some reference to the fact that it is an assignment for value. Do you know of any value that was paid for the assignment? A. No.

Q. Did you receive any? A. No.

Q. Now, one more thing. Referring to Exhibit 25, and particularly to the last paragraph thereof, we find the following:

"The donor specifically reserves the right during the time of this trust to pledge any of such policies as collateral or to exercise the loan rights as provided in said policies, [133] and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the trustee named herein shall not be required to join in the application for said loans."

Now, you knew as a matter of fact, of course, did you not, the terms of this trust agreement which you prepared?

(Testimony of E. J. Stanfill.)

A. I did at the time. I never had an occasion to pull it out of the file and go over it after the time I drew it up.

Q. But you did know that Mr. Weyen could do certain things with those policies even without your signature, didn't you? A. Yes.

Q. And did you ever sign anything in connection with these policies that did not previously have Mr. Weyen's signature on it? A. No.

Q. Was his signature always there before you signed? A. Always there.

Mr. Arnold: That is all.

Mr. Etter: That is all.

Mr. Rowan: I have a question or two, if the Court please. [134]

The Court: All right.

Cross Examination

Q. (By Mr. Rowan): Mr. Stanfill, are you still acting as guardian of the estates of the two minor children? A. I am.

Q. And are you still acting as trustee for the children as beneficiaries under the trust agreement set up to you? A. I am.

Mr. Etter: I think probably that is going to be a question for the Court.

Mr. Rowan: It is largely elementary.

Q. Did anyone ever request, either Bob Weyen or Paul Keeton or anyone else, that you sign any instrument as trustee in any of these exhibits that

(Testimony of E. J. Stanfill.)

have been offered other than the trust agreement itself? A. No.

Q. Did you ever sign as trustee? A. No.

Q. Now, referring to the last paragraph of Exhibit 25, please, do you find any reservation of the right to change beneficiary in there? A. No.

Q. You do find reservation of the right to pledge or cash or whatever the term is that is used? [135]

A. Yes.

Q. And was it your understanding that the children were made the beneficiaries through you as trustee?

Mr. Etter: I will object to that question as calling for the ultimate conclusion that the Court has got to fix. The instrument speaks for itself.

The Court: I think that is a conclusion for the Court to draw, probably. I will sustain the objection.

Mr. Rowan: All right.

Q. Now, you say you were acting in some capacity, manager, or what did you call it, in a creditors' pool?

A. I was handling the money as it came in to pay the creditors under that pool arrangement.

Q. Did that have anything to do whatever with the trust agreement? A. No.

Q. Was it a separate instrument?

A. Yes, it was made out almost a year after the trust agreement.

The Court: I might state in my ruling that the instrument will speak for itself, I am assuming there

(Testimony of E. J. Stanfill.)

isn't any contention here that it is ambiguous or requires extraneous testimony for explanation.

Mr. Rowan: If the Court please, there is a possible duplication or a dual authority in that and that is the reason [136] I was asking.

The Court: I think even so, however, that if extraneous testimony is resorted to to resolve an ambiguity, that it would be the surrounding circumstances, what the parties said, and what is indicated they intended by what they did and said, rather than the trustee's intention. He might intend one thing and say another, not what he might have thought about it.

Mr. Etter: I find no contention anyplace that there is any claimed ambiguity.

The Court: It is rather the character of the instrument that is in controversy, whether it is irrevocable or not.

Q. (By Mr. Rowan): I will ask you then, Mr. Stanfill, if at the time you drew that trust for Mr. Weyen, whether or not he gave you instructions to make yourself the beneficiary irrevocably?

Mr. Etter: Just a minute, I will object to that. Instructions to make him trustee irrevocably, that instrument speaks for itself. That question is leading and suggestive and calls for the statement of a deceased party, as a matter of fact, and is not necessary to resolve any ambiguity.

The Court: I will sustain the objection to that, I think, unless there is some ambiguity pointed out.

(Testimony of E. J. Stanfill.)

Mr. Rowan: I will withdraw the question and stand on [137] the sustaining of the objection.

Q. Did you understand at that time that there was a difference in assignment of insurance policy and a change of beneficiary.

Mr. Etter: Object to that, too.

The Court: I will overrule the objection. I don't see the materiality of it. A. Yes.

Mr. Rowan: That is all.

The Court: Are there any other questions of this witness?

Mr. Etter: No.

The Court: I wanted to make this clear. I think it appears, perhaps, from these documents, but we might have a question of conflict of laws here which might be material.

I assume that Mr. Robert F. Weyen and his wife Mary P. Weyen on these critical dates here in September, 1954, September 22nd and 23rd, were residents of the state of Washington, were they?

A. Yes.

The Court: They lived in Clarkston?

A. Yes.

The Court: In Asotin County through all this transaction that you have related here. I assume, then, that Mr. Weyen must have moved to Idaho at some time, didn't he, because [138] his estate is being probated there?

A. He did shortly after the divorce, he moved to Idaho and took up a motel residence.

(Testimony of E. J. Stanfill.)

The Court: But that was after he had executed the trust agreement? A. Yes.

The Court: And after the divorce had been granted? A. Yes.

The Court: And after he had made his will?

A. Yes.

The Court: So that all of these instruments were executed by him while he was a resident of the state of Washington? A. That is correct.

The Court: Any other questions?

Mr. Etter: No.

Mr. Rowan: None.

Mr. Etter: That is all.

Mr. Arnold: If the Court please, the defendant and cross-complainant Stanfill, as trustee, rests at this time with one statement I would like to make, which may be unnecessary but in view of cross examination distinguishing between the assignment to Elfrieda May by Mr. Stanfill and the assignments to Mr. Defenbach, I would like to make it clear that we are claiming adversely to Elfrieda May for the [139] same reason and on the same theory that we are claiming adversely to Defenbach.

The Court: All right.

Mr. Rowan: I will waive any proof at this time.

Mr. Etter: Do you waive it for good?

Mr. Rowan: I am waiving the statement to the Court, for the orderly proof of the case of the Defenbach agreement, I believe, would come next. I have a reply to your counterclaim.

(Witness excused.)

The Court: Is anybody here representing Mary P. Weyen?

Mr. Etter: She is not a defendant, she filed a disclaimer, it is my understanding, and that Mr. Stanfill is appointed as guardian in her place for the children.

The Court: Was she guardian of the children at the time this action was started or was that erroneous?

Mr. Arnold: If the Court please, may I explain what happened?

The will of Mr. Weyen was not filed for record for a few weeks, and as the mother of the children and not knowing that Mr. Stanfill was nominated as testamentary guardian, she filed and obtained, as the mother usually can, letters of guardianship for the children. Upon the discovery that Mr. Stanfill was named as testamentary guardian, she resigned as guardian of the estates of the persons. Separate letters were [140] then issued to her as guardian of the persons of the children and Mr. Stanfill qualified under the will as guardian of the estates of the minor children. So that from the financial standpoint, he was the proper party before the Court as guardian of those children and as trustee, as well.

Now, Mary P. Weyen has filed a disclaimer personally and as guardian of the persons of the children and joined in the prayer of Mr. Stanfill's action as trustee. I think that does appear in the file. At least, I served copies.

Mr. Rowan: May I add, if the Court please, I can clarify this?

Mr. Greenough's complaint was drawn and I think filed before he discovered that Mr. Stanfill had been appointed guardian of the estates of the children, and I told him and he at that time told me he intended to make a trial amendment or have a stipulation to cover it, so if it is necessary, I am sure he will ask that Mr. Stanfill be named and the complaint be deemed amended for that purpose.

The Court: I was a little concerned about it because I thought we might be getting on thin ice here in this Court's jurisdiction. Diversity depends upon the claimants, as I understand it, the diverse citizenship of the claimants in an interpleader action, and there is no one here a resident of this district, as I gather it now, except [141] Mary P. Weyen.

Mr. Arnold: The children are.

The Court: Well, the children are not here except through their guardian, who is a resident of Idaho or a resident of Oregon, is he not? Mr. Stanfill is guardian of the children?

Mr. Arnold: Stanfill is guardian of the estates of the children.

Mr. Rowan: In Asotin County, Washington.

The Court: Well, is that guardianship pending in the state of Washington?

Mr. Rowan: Asotin County, Washington.

The Court: It runs in my mind, we have these cases coming up in connection with automobile collision litigation a good deal, that so far as diversity jurisdiction is concerned, the residence of the guardian and not of the wards or the person rep-

resented is what governs so far as diversity is concerned. I always like to be sure that we have got jurisdiction, because if we haven't got jurisdiction, we have got nothing in Federal Court.

Mr. Rowan: I think I *will that* to Mr. Greenough's attention. I know he wants to correct the complaint.

The Court: It may be all right anyway. I assume if a person is brought in in good faith as a party having an interest and then regardless of whether the Court decides against them or even they disclaim afterwards, that the [142] jurisdiction depends upon the situation as alleged in the complaint. I believe that is true, isn't it?

Mr. Rowan: That is my understanding, and both cross-complaints, as I recall it, allege he was appointed guardian in the state of Washington and they are not denied by any reply.

The Court: Well, all right, go ahead whoever is next here.

Mr. Rowan: We defer to the defendant Defenbach.

The Court: All right.

Mr. Etter: Well, for the matter of the case in chief, at this time we merely have the assignment from the trustee for the benefit of creditors. If you want to examine it, we can have it marked and admitted.

The Court: That will be Defendant——?

Mr. Etter: Defenbach.

The Court: Defenbach.

The Clerk: 27, your Honor.

The Court: Exhibit 27 for identification?

The Clerk: Yes, sir.

The Court: Have you seen this document, gentlemen?

Mr. Rowan: We have a copy. I haven't seen this original.

If the Court please, the defendant objects to the introduction of this unless and until it is [143] proven what the alteration or addition was put in for and how it comes to be inserted. There is an addendum that has been pasted onto paragraph 9 by a separate sheet and we would object to it until proof is made as to how that happened.

Mr. Etter: It is on everybody's copy.

Mr. Rowan: It is on my copy, Mr. Keeton.

The Court: In this copy, I think what Mr. Rowan is referring to under paragraph 9, it seems to be typed here: "Party of the first part has the following policies of life insurance, to-wit:" policy number, name, and amount, and then there is a slip pasted on.

Mr. Etter: All right, it is in all the copies, so I don't know what—Mr. Defenbach, would you take the stand?

RALPH B. DEFENBACH

called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

Q. (By Mr. Etter): Your name is Ralph B. Defenbach? A. That is correct.

Q. Handing you the Plaintiff's Exhibit 12 for

(Testimony of Ralph B. Defenbach.)

identification—or Defendant Defenbach's Exhibit 27 for identification—will you examine that and tell me what it is?

A. That is an agreement that I signed with Robert F. Weyen [144] wherein I agreed to act as trustee for the benefit of his creditors.

Q. You reside where, Mr. Defenbach?

A. Lewiston, Idaho.

Q. What is your occupation?

A. Public accountant.

Q. And you have resided in Idaho for how long?

A. Oh, approximately thirty years.

Q. And you were acquainted with Robert Weyen in his lifetime?

A. For about eight years prior to his death.

Q. And you consented to act as the trustee in this document? A. Yes.

Q. For the assignment of creditors, is that correct? A. That is right.

Q. And was this document signed by Mr. Weyen in your presence? A. Yes.

Q. And by you? A. Yes.

Q. Can you tell us, with regard to the numbers of the policies, when that was put in there?

A. That was there at the time that I signed the agreement.

Q. And was it there at the time Mr. Weyen signed the agreement? A. Yes. [145]

Mr. Etter: Nothing further.

Mr. Rowan: I have some cross-questions.

(Testimony of Ralph B. Defenbach.)

Mr. Etter: All right, go ahead. Mr. Arnold, go ahead.

Cross Examination

Q. (By Mr. Arnold): Mr. Defenbach, I will hand you Defendant Stanfill's Exhibit No. 25, which is the trust agreement between Robert F. Weyen and E. J. Stanfill dated September 3, 1953. What knowledge, if any, did you have of the existence of that agreement at the time that you executed Defendant's Exhibit 27, which is the assignment to yourself?

A. Well, actually, I had no knowledge until this very moment when I see it, although at a meeting held in attorney Hyatt's office in the early part of July of this year, I think you submitted to me what you alleged to be a copy of such agreement. That was my first knowledge of the existence of any such document.

Q. Mr. Defenbach, did these assignments which were made by Mr. Stanfill and Mr. Weyen to yourself relative to the several policies go through your office en route to the channels for notifying the company? A. No.

Q. Who handled those?

A. I think—the only first exact knowledge [146] I had was receiving the policies from Mr. Weyen. I was informed that this was going to be done.

Q. I see. Did you examine the policies?

A. Yes.

Q. Did you observe that they at one time, at

(Testimony of Ralph B. Defenbach.)

least, or previously had designated Mr. E. J. Stanfill as trustee as beneficiary?

A. I have no memory that I did.

Q. You didn't see that. Without reference as to whether you knew of the existence of this particular agreement or not or of its terms, you did know that Mr. Stanfill was a trustee of some sort of insurance, did you not, at the time of the execution of this agreement?

A. I was told, and it may be recited in the agreement, that he had, that Mr. Stanfill was going to sign a—I don't know what you would call it—a waiver of some claim that he had on these policies and that that was being done.

Q. Mr. Defenbach, I will hand you Plaintiff's Exhibit 8, which is a policy of insurance in the Sun Life dated the 16th of September, 1953, and ask you if that policy was in your possession at the time or prior to the execution of Defendant Defenbach's Exhibit 27? A. I wouldn't know.

Q. Did you see these policies before the [147] execution of this document which is Exhibit 27?

A. No.

Q. You referred, I believe, to a conversation in Mr. Hyatt's office where I showed you an alleged copy of Defendant Stanfill's Exhibit 25. Did you not at the same time tell me that you had always known there was some kind of a trust, but didn't know the exact nature of it or didn't know it was reduced to writing? Didn't you tell me that at that time?

(Testimony of Ralph B. Defenbach.)

A. I have no memory of such a statement.

Q. How is your memory generally, good?

A. Very good.

Q. Did you ever discuss this matter with Mr. Keeton at all? Did you know the terms or the nature of the business you were getting into when you accepted this position as assignee for the benefit of creditors?

A. I discussed the matter very largely with other representatives of creditors and Mr. Weyen himself. That is where I obtained the information that determined me to consent to act in this capacity. Now, my conversations with Mr. Keeton were very limited.

Q. Did you have any part in the preparation of the assignment for the benefit of creditors, which is Defendant's Exhibit 27? A. No. [148]

Q. Did you read it and study it before you accepted the position?

A. No, I read it, but I didn't study it. Mr. Weyen told me that is what he wanted.

Q. By the way, Mr. Defenbach, what payments, if any, have you in your capacity of assignee for the benefit of creditors made to the Sun Life in the way of premiums? A. What payments?

Q. Did you make on these policies, yes, if any?

A. I couldn't tell you the amount, but some premium payments have been made.

Q. Between the date of November 16, '54 and the death of Mr. Weyen in April of '55?

A. Yes.

(Testimony of Ralph B. Defenbach.)

Q. Also some loans were procured during that period, were they not?

A. That is right. I know what they are.

Q. Were the payments of premiums made in that period of time in excess of the amount procured by loan from the company?

A. Oh, I would say no.

Q. Did you in your capacity as assignee make any examination of public records in your area to determine what indebtedness would appear of record or other showings of the interest of Robert Weyen?

A. No. [149]

Q. Did you at that time know anything about his general financial condition?

A. Yes.

Q. But all the information you had was what somebody else told you, you made no independent examination?

A. All the information was what Mr. Weyen told me.

Q. I see. Did Mr. Weyen tell you anything about any provisions he had made for his children?

A. No.

Q. Referring you to paragraph 7 of Defendant's Exhibit 27, which commences on page three and runs on to page four and lists what purports to be priorities of payments and disbursements, will you examine that and see if you find any provision in that for the care of Mr. Weyen's children?

A. Well, Paragraph (f), living expenses for party of the first part.

Q. Who was the party of the first part?

(Testimony of Ralph B. Defenbach.)

A. Robert Weyen.

Q. I am speaking of the children?

A. Well, I would say that——

The Court: He didn't make any provision for his children in his assignment to creditors, did he? Isn't that conceded?

A. There is a pro rata distribution here [150] of monies, \$200.00 a month child support in the decree.

Mr. Arnold: If the Court please, I think perhaps I should pass this to the Court for examination of the next to the last provision.

The Court: Is that the assignment?

Mr. Etter: It is in the divorce decree, isn't it?

Mr. Arnold: That's right.

The Court: Oh, yes.

Q. (By Mr. Arnold): Now, just to clarify one or two points, Mr. Defenbach, you state that you did not or don't recall that you ever had this policy in your possession or any of the policies in your possession prior to November 16, 1954?

A. No, I'm positive that I didn't.

Q. You have heard the testimony here this morning or this afternoon, particularly on the cross examination of Mr. Stanfill, to the effect that certain assignments were made to you in October on two different occasions? You heard that, did you not?

A. Yes, I heard about some assignments, but not to me, that I know of.

(Testimony of Ralph B. Defenbach.)

Q. Well, didn't anybody ever assign these policies to you?

A. Not in October. I didn't sign this agreement until the 16th day of November.

Mr. Arnold: Beg your pardon, your [151] Honor, there are so many of these I can't lay my hands on the one I am looking for.

The Court: Are those the ones that Mr. Etter called Mr. Stanfill's attention to?

Mr. Etter: That's right, one in October and one in November. The 24th of November, that is the one we are talking about. The other in October is to Mrs. May.

Mr. Arnold: I beg your pardon.

Q. Did you know that anyone had made any assignments of these policies to you after November 16, 1954?

A. Oh, how can I answer that? Yes, I did.

Q. When did you first find out about it?

A. I imagine most of it was hearsay from Mr. Keeton, until I had some dealings with the Sun Life itself and their agents. Probably about the time we secured those loans in February.

Q. What value, if any, did you in your capacity as assignee for the benefit of creditors pay for these assignments of insurance policies?

A. I don't understand your question.

Q. I say, what value, if any, did you as assignee for the benefit of creditors pay for the assignment of these policies to you?

(Testimony of Ralph B. Defenbach.)

Mr. Etter: Well, of course, I think I will object to that. He is a representative of creditors himself, that's all. [152] He is representing the creditors. The consideration appears on the assignment itself.

Mr. Arnold: I don't think that is conclusive and it has been denied in the pleadings that there was any consideration. I asked him what consideration, if any, he paid and I think it is a very proper question.

Mr. Etter: He has already said he is only a representative of the creditors.

Mr. Arnold: I asked him what he paid in that capacity, if anything, as a representative.

The Court: Well, I will permit him to answer. I assume there wasn't anything paid other than claims of creditors here.

A. That would be right, and probably business relationships that I had with Mr. Weyen.

Q. (By Mr. Arnold): What would be right?

A. I don't think I understand your question clearly.

The Court: You didn't pay any money for these assignments? A. No, no.

Q. (By Mr. Arnold): Did you transfer anything in value in property for them? A. No.

Mr. Arnold: All right, that is all.

The Court: Any other questions? [153]

Mr. Rowan: I have a question or two.

(Testimony of Ralph B. Defenbach.)

Cross Examination

Q. (By Mr. Rowan): Mr. Defenbach, will you refer to Exhibit 27, if it is before you?

A. Oh, 27, yes.

Q. Where did you sign that?

A. In Mr. Keeton's office in Lewiston.

Q. Did you read it before you signed it?

A. I glanced through it, yes.

Q. So that you knew what it was?

A. Yes, generally speaking.

Q. And did you check the insurance policies mentioned in that agreement to see if they were all there?

A. At that time?

Q. Yes?

A. No.

Q. At the time you signed it?

A. No.

Q. Did you ever check each one of those policies mentioned in paragraph 9 to see who had them?

A. Oh, I am positive I did at the time that we asked for the loan.

Q. At the time that you signed a consent to a loan?

A. At the time we made the request for the loan, yes, in [154] February. I am positive I did then.

Q. And who got the proceeds of that loan?

A. I did.

Q. And what did you do with it?

A. Deposited it in the trust fund.

Q. The trust fund that you were executing under this Exhibit 27, wasn't it?

A. That is correct.

(Testimony of Ralph B. Defenbach.)

Q. You borrowed on those policies to pay the creditors. Will you refer to the exhibit again and tell us whether you accepted that instrument as a mortgage?

Mr. Etter: Of course, I think the instrument speaks for itself, asking this man whether he took——

The Court: It doesn't seem to me it makes any difference how he accepted it.

Mr. Etter: How he accepted it.

The Court: It wouldn't change the character of it or the character of the transaction.

A. I wouldn't know how to answer that question.

The Court: Doesn't your whole case turn on whether or not this original trust is revocable?

Mr. Etter: That is correct.

The Court: I don't see whether it makes any difference what he thought or what he did. It is revocable if he could make the assignment for the benefit of creditors; if it isn't, [155] he couldn't. It seems to me that this lawsuit turns on that and here we are spending hours about nothing.

Mr. Etter: That is it.

The Court: But go ahead, I don't want to restrict you. If you think you have got something here, why, by all means, put it in.

Mr. Rowan: I want to just ask him to reconcile paragraphs 11 and 14. He says he read it before he signed it.

I might say to the Court that I don't want to

(Testimony of Ralph B. Defenbach.)

impose on the Court, but it is clearly contradictory.

The Court: The only thing I am asking for is enlightenment. You gentlemen asked whether there was any consideration, and so on. I would like to know why that is material. I think that the case turns on whether or not your original trust for the benefit of the children is a revocable trust.

Mr. Rowan: We agree one hundred percent upon that.

Q. Have you looked at the paragraph?

A. The only way I could answer your question would be to depart from your question some. The matter of some kind of an arrangement between Mr. Weyen and his creditors had been brewing for a long time, and on account of the fact that I had handled some of Mr. Weyen's affairs, like his income tax returns, for instance, counsel for some of the creditors suggested that maybe I might be a good third party in some financial [156] arrangement and that met with his approval. So these various attorneys made several requests of me and I had several consultations with them, the first part of it being whether or not I wanted to go into such an agreement. Finally, after talking with Bob Weyen personally, I said that I would, and when I went down to Mr. Keeton's office, this document was prepared. He signed it in my presence and I said, "Is this what you want to do, Bob?" and he said, "Yes, it is." So I glanced through it just roughly and signed it.

Q. Now, when you signed it, did you look at

(Testimony of Ralph B. Defenbach.)

Policy No. 1,952,847, or shortly after that, and find that that was issued directly in the first instance to Mr. Stanfill as trustee? A. No.

Q. You didn't? A. No.

Mr. Rowan: I think that is all.

The Court: Any other questions?

Mr. Etter: That is all.

(Witness excused)

I would like as part of my case to call Mrs. May for a few questions.

The Court: Yes, all right. [157]

ELFRIEDA MAY

called and sworn as a witness on behalf of the defendant Ralph B. Defenbach, trustee, was examined and testified as follows:

Direct Examination

Q. (By Mr. Etter): You are Mrs. Elfrieda May? A. That's right.

Q. You reside in Los Angeles at the present time? A. I work there.

Q. You work there? A. Yes.

Q. Is your residence still in Idaho?

A. My residence is in Spokane.

Q. Oh, in Spokane? A. That's right.

Q. I see. How long has it been here, Mrs. May?

A. Just recently since I came back up here again.

Q. Prior to the time this action was started, you were a resident of California, were you not?

(Testimony of Elfrieda May.)

A. That's right.

Q. And you were the mother of Robert Weyen, now deceased? A. Yes, I am.

Q. Mrs. May, are you acquainted with this document which is indicated as Defenbach's [158] Exhibit 27?

A. I have read it, that's all. That was the only thing I know anything about it. I haven't given it any study.

Q. But you knew about the arrangement to draw such a document for the benefit of your son?

A. That is what they told me.

Q. That is what they told you? A. Yes.

Q. And you discussed this same matter with Mr. Keeton, did you not? A. Yes.

Q. And the purpose of the drawing of the document, isn't that correct?

A. Well, he asked me about it. I didn't know anything about the document or what it should contain.

Q. But I mean he discussed with you the purpose? A. Yes, to cover his debts.

Q. And, as a matter of fact, you paid Mr. Keeton the fee for drawing this assignment, did you not?

A. Well, not exactly for drawing the assignment, I wouldn't say that.

Q. Well, for other things, including the assignment, shall we say? A. Yes.

Q. That is correct. And discussed with him this complete matter? A. Yes. [159]

(Testimony of Elfrieda May.)

Q. And you knew at the time when you discussed this with Mr. Keeton, did you not, Mrs. May, that these policies of insurance were going to be assigned to Mr. Defenbach?

A. I wouldn't know, not at the time they drew those documents.

Q. Didn't Mr. Keeton discuss that with you, too, with you and your son?

A. We were talking about it, but my son didn't want to consent to turn them in there.

Q. I see.

A. He wanted to keep control of them.

Q. Were you down there the day this was signed? A. No, I don't think so.

Mr. Etter: That is all.

Cross Examination

Q. (By Mr. Rowan): Did I understand you to say your son wished to retain control?

A. He wanted to retain control of the documents. He only gave them for collateral to cover his debts during his lifetime, because he expected to pay it off.

Q. Did he always so intend, to your knowledge?

Mr. Etter: I will object to that, your Honor.

The Court: Well, yes, I will sustain the [160] objection.

Q. (By Mr. Rowan): Mrs. May, referring to the one policy which was assigned to you, but in which Mr. Stanfill was made the trustee, you are

(Testimony of Elfrieda May.)

not claiming under that policy as against the trustee? A. No, I am not.

Mr. Etter: Just a moment, pardon me. There is nothing in the pleadings of a disclaimer on behalf of Mrs. May that I can see. The policy which she has in her possession, as I understand it, was assigned to her by Mr. Stanfill from this so-called irrevocable trust, and now counsel is asking whether she has got any claim to it. If there is no claim to it and there is a disclaimer, there is no standing in court as far as a party litigant that I can see.

The Court: It isn't just clear to me what her position may be on that.

Mr. Etter: I submit what could her position be otherwise than as the interpleader action says of having and claiming some interest in it. Well, if counsel is going to make the statement that she doesn't claim any interest in it at this time, I think probably she should be dismissed as a party in the interpleader action.

Mr. Rowan: If the Court please, may I ask another question before your Honor rules?

The Court: Yes.

Q. (By Mr. Rowan): Mrs. May, you are [161] the grandmother of these children?

A. Yes, I am.

Q. And it is your desire that the children retain anything that they are rightfully entitled to?

A. Absolutely, yes.

Q. And as against the children, you are not making any claim, is that correct?

(Testimony of Elfrieda May.)

A. That's right.

Mr. Etter: There is a claim——

Q. (By Mr. Rowan): You are making a claim as against Mr. Defenbach?

A. Yes, I would be.

The Court: I think that the only way that could be done, if she is entitled to the proceeds of a life insurance policy under the law and the facts here, I would have to make a finding and judgment to that effect, unless she wants to formally disclaim here, and if she wants to give it to the children afterward, why, that is a matter for her to decide, but I don't think that I can run a lawsuit where we are saying she is claiming against one party and not claiming against another.

Mr. Rowan: Well, if the Court please, the two claims are a little bit ambiguous, is what I was getting at.

The Court: Oh, well——

Mr. Rowan: I don't think I need to [162] pursue it because I agree with your Honor that the whole case hinges upon revocability of the Stanfill trust and whether there was a reservation of the power to change the beneficiary in that trust.

I would like to ask one question on cross examination.

The Court: Of course, I understand that she is the grandmother of the children and she isn't asserting any adverse claims against them.

The Witness: No.

Mr. Rowan: That is correct.

(Testimony of Elfrieda May.)

Q. Who, if anyone, put up all the money that was put up at the time the Defenbach agreement was signed, if you know?

Mr. Etter: I will object to that as being wholly immaterial, who put the money up.

The Court: I don't know what money you refer to, Mr. Rowan.

Mr. Rowan: We have asked Mr. Defenbach if there was any consideration paid at that time. He said that there wasn't. It could be used either for the purpose of impeachment or for the purpose of showing what consideration was——

Mr. Etter: He said he didn't pay anything for the assignment. Mr. Defenbach said he, Mr. Defenbach, didn't pay anything.

The Court: Didn't pay any money. You [163] mean money put up for the expenses of drafting the assignment?

Mr. Rowan: Money to pay certain creditors at the time the Defenbach agreement was signed.

The Witness: May I explain that, if you please?

The Court: Well, just a moment. I don't see the materiality of it, but I will permit her to answer.

A. At the time this agreement was made, there was a debt that my son owed to his wife that came up in the divorce proceedings that he owed her around \$3,000 or something like that. And at that time when they drew up this agreement, Mr. Keeton called me and asked me, he said that Mrs. Weyen was going to foreclose on this deal and this

(Testimony of Elfrieda May.)

would no go through unless her \$3,000 was paid or near that sum and he said there are no creditors are going to put that up, and I said, "I will put up that money for it to get this paper through in an operating affair." I put up this money to make this agreement work. Otherwise, they were not going to even accept it, you see.

The Court: I see.

Q. (By Mr. Rowan): That was the payments due Mrs. Weyen under the divorce decree, was it not? A. That is correct.

Mr. Rowan: That is what I wanted, that is all.

The Court: Any other questions? [164]

Mr. Etter: No.

The Court: Time for a recess, the Court will recess for ten minutes.

(Witness excused)

(Whereupon a short recess was taken.)

Mr. Rowan: If the Court please, may we approach the bench?

The Court: Yes.

(Whereupon, the following proceedings were had before the bench:)

The Court: The residuary clause under paragraph designated Third: "All the rest, residue and remainder of my property, real, personal and mixed, at whatever time acquired by me and where-soever situated, I give, devise and bequeath to Emilie Mullins." That is the one you had in mind?

Mr. Etter: That's right.

The Court: You wish to stipulate as to Emilie Mullins?

Mr. Rowan: That she was the woman he was keeping company with.

Mr. Etter: Keeping company with.

Mr. Arnold: Further identification, she was a married woman.

Mr. Etter: She was a married woman at the time.

The Court: Oh, I see, all right. The record [165] may show that, then.

Mr. Etter: There is one other thing here and it is always a touchy subject. Now, Ed Stanfill was telling me he hasn't got too good a recollection of this. Keeton has got a letter there that he wrote to him about this last assignment and Ed came to his office and signed it. He wrote that letter in January when the Sun Life required it. I don't want a lawyer who is in this controversy on the stand at all to get into a hassle. However, Ed says he doesn't quite remember and, at the same time, I feel it our duty to have all the facts before the Court.

Mr. Arnold: However, since he came in, he didn't read the letter. That is the way I understood it.

Mr. Etter: No, he didn't.

Mr. Arnold: Then it is immaterial.

Mr. Etter: It would be material to this extent, that he talked about the purpose of signing it.

Mr. Arnold: I don't think that follows.

Mr. Rowan: If you go into that conversation, you open it up, if it is material.

Mr. Etter: Well, it is only material in this respect, that if Ed makes a flat statement he didn't know anything about this or didn't discuss it, it is material.

Mr. Arnold: Well, I think you ought to call him.

Mr. Etter: But he is a lawyer, he doesn't [166] want to be called and doesn't want to be in a position——

Mr. Rowan: We will waive the objection and he can argue the case to the Court, if the Court is agreeable to that.

The Court: Well, yes.

Mr. Etter: All right.

(Which was all of the proceedings had before the bench.)

Mr. Etter: Call Mr. Keeton to the stand.

The Court: It is understood that Mr. Keeton may testify as a witness here without sacrificing any rights he may have as an attorney in the case to argue or otherwise?

Mr. Arnold: That is agreeable.

Mr. Rowan: That is agreeable.

The Court: Or otherwise participate.

PAUL C. KEETON

called and sworn as a witness on behalf of the defendant Ralph B. Defenbach, trustee, was examined and testified as follows:

Direct Examination

Q. (By Mr. Etter): Your name is Paul C. Keeton? A. Yes.

Q. You are a member of the Idaho bar?

A. Yes. [167]

Q. And of this Court? A. Yes.

Q. And are one of counsel in this case?

A. That's right.

Q. And at the time of the drawing of the assignment for the benefit of creditors, you drew that document, Mr. Keeton?

A. Yes, I prepared the document.

Q. And who were you representing at that time, one, two, or three people, or one person, whatever it was?

A. Well, I was representing Mr. Weyen and Mr. Defenbach both in an attempt to make some arrangement for Mr. Weyen's creditors.

Q. For Mr. Weyen's creditors. Now, with respect, Mr. Keeton, to certain policies that are involved in this litigation, and I refer now to all of those policies that are involved in the present litigation except the one in the first count of the interpleader complaint—— A. Yes, sir.

Q. ——did you secure an endorsement of Mr. Stanfill on what is indicated as an assignment for

(Testimony of Paul C. Keeton.)

value, being part of Plaintiff's Exhibit 11, which I hereby show to you? A. Yes, I did.

Q. And do you know or do you remember where that was signed?

A. It was signed in my office in Lewiston. [168]

Q. And can you tell us what the circumstances were surrounding it?

A. Well, that had gone into the Sun Life Company without Mr. Stanfill's signature on it, and on January 13, 1955 they wrote me a letter asking me to get Mr. Stanfill to sign it along with Mr. Weyen.

Q. Is that the letter there that you received from the Sun Life? A. Yes.

Q. Open to these gentlemen's inspection if they wish to see it? A. Yes.

Q. Pursuant to that, what did you do?

A. I wrote Mr. Stanfill, who I knew was over in Oregon farming at the time, care of Donald Moore, attorney at Clarkston, asking him to sign this document, and before I could mail the letter, he came into my office and signed it in my office so I never mailed the letter.

Q. Mr. Stanfill did? A. Yes, he did.

Q. Did you discuss at all with Mr. Stanfill the purpose of executing that document?

A. Only that the insurance was being transferred to the pool of November 16, 1954.

Q. You advised him of that? [169]

A. Yes, I am sure that I did.

Mr. Etter: That is all.

(Testimony of Paul C. Keeton.)

Cross Examination

Q. (By Mr. Arnold): Mr. Keeton——

Mr. Arnold: Excuse me, am I in order?

The Court: Yes, you may go ahead.

Q. (By Mr. Arnold): May I see the Sun Life letter which you said was open to inspection?

A. Yes, sir.

(Witness hands letter to counsel.)

Q. This is the letter, as I understood you to testify, that you received from the Sun Life Assurance Company, which is dated January 13, 1955?

A. Yes, it is.

Q. May I have it marked for identification?

A. Certainly.

Mr. Arnold: Mr. Clerk, will you staple those together and mark it for Defendant Stanfill's identification number?

The Clerk: 28.

Mr. Arnold: 28. Stanfill's 28, your Honor.

Q. (By Mr. Arnold): Now, Mr. Keeton, in the opening paragraph of that letter, the author refers to loan papers in connection with the policies, does he not? A. Yes, he does. [170]

Q. He doesn't refer to any assignment or change of beneficiary there?

A. Not in the first paragraph, no.

Q. Does he at any place in that letter refer to change of beneficiary?

A. I don't think he does refer to that, no.

Q. Where in the letter does the author refer to anything other than loan?

(Testimony of Paul C. Keeton.)

A. Well, he does in the second paragraph, he says: "This agreement is conflicting, however, in that it apparently grants to both the trustee and Mr. Weyen under separate clauses the right to pledge the policy contracts as collateral, etc.

In November 1954 Mr. Weyen re-assigned the policies to Ralph B. Defenbach, trustee under that certain assignment to trustee for benefit of creditors, dated November 16th, 1954. In view of the contradictions of the trust agreement with Mr. Stanfill, we believe he should join in the new assignments, dated November 16, 1954, thereby eliminating any possible interest he may have retained. We are taking the liberty of attaching the original of the assignment for Mr. Stanfill's signature."

That is the document that is part of 11.

Mr. Arnold: If the Court please, I will offer in evidence Defendant Stanfill's Exhibit 28. [171]

Mr. Etter: No objection.

Mr. Keeton: No objection.

The Court: It will be admitted, then.

(Whereupon, the document was admitted in evidence as Defendant Stanfill's Exhibit 28.)

Q. (By Mr. Arnold): Now, Mr. Keeton, you stated a few minutes ago that you were acting as attorney for Mr. Weyen and Mr. Defenbach in an effort to work something out for creditors, is that substantially correct? A. Yes.

Q. Did you ever see any of these policies in question that are subject to this litigation prior to

(Testimony of Paul C. Keeton.)

the execution of Defendant Defenbach's Exhibit 27 on the 16th day of November, 1954?

A. I am certain that they were in my safe for a long time prior to that, off and on.

Q. Did you ever examine them?

A. I never examined them.

Q. Did you know the way the beneficiary had been previously endorsed upon the policies? Mr. Stanfill as trustee, I mean?

A. I never knew anything about the Stanfill trust until about a week after this was entered into. When he brought [172] the policies over, then I knew about it.

Q. I thought you said they were in your safe for a long time before that was executed?

A. Yes, but I never knew their contents.

Q. When you say he brought them over a week afterwards, what do you mean?

A. I said they were in and out of my safe. If you wish, I can explain that.

Q. Pardon?

A. I can explain it, if you wish.

Q. You contend, then, that you did not know that Mr. Stanfill was trustee of any sort at all until after the 16th of November of '54?

A. I am just about positive that I did not.

Mr. Arnold: That will be all.

Mr. Etter: That is all.

(Testimony of Paul C. Keeton.)

Cross Examination

Q. (By Mr. Rowan): Mr. Keeton, where were the policies when Bob Weyen died?

A. When Bob Weyen died, I am certain they were down in the cabin at the Sacajawea Motel.

Q. In Bob Weyen's possession?

A. Either in Bob Weyen's possession or Mr. Deffenbach's. It seems to me they were in a tin box in the Sacajawea Motel. [173]

Q. Don't you recall, as a matter of fact, that Mrs. May brought those policies to your office and gave them to you after Bob Weyen's death?

A. That's right, and they were at the motel.

Q. Yes. The motel, that was where Bob was living?

A. That's right, that is where she got them, from the Sacajawea Motel.

Q. That is what I am asking, if they weren't in Bob's possession at the time he died?

A. Yes, I think they were.

Q. The first agreement that you presented to Bob in the fall of 1954, he refused to sign, did he not?

A. Well, it was certainly re-drafted several times.

Q. Yes, you re-drafted it? A. Yes, it was.

Q. And you knew at the time you re-drafted that agreement that Mrs. May was paying the premiums on those policies, did you?

A. I knew that she had loaned him money and

(Testimony of Paul C. Keeton.)

I knew at some time she had paid the premiums on the policies, yes.

Q. Now, the Sun Life sent you a request for assignment of policies on their form, did they not, printed form? A. Yes.

Q. The one that is in the file?

A. Yes, I am sure they did. [174]

Q. They never did send you any request for change of beneficiary, did they?

A. No, they never did.

Q. Did anyone ever request that?

A. Never that I know of.

Mr. Rowan: That is all.

Mr. Etter: That is all, Mr. Keeton. That is all.

(Witness excused)

Mr. Rowan: I think we rest, too, if the Court please.

The Court: Is that all of the evidence, then, gentlemen?

Mr. Etter: That is all, your Honor.

The Court: Are you ready to proceed with the argument?

Mr. Etter: Yes.

The Court: You may proceed if you are ready.

Mr. Etter: And as I understand the rule, the burden is upon the party who contends for an irrevocable trust, your Honor, that he must prove it by clear and convincing, rather than a preponderance, of evidence, so these people who are making that claim of irrevocability, I think they have the laboring oar.

Mr. Rowan: We are ready to assume the burden.

The Court: Oh, say, I think that Exhibit No. 27 has never been admitted in evidence. [175]

Mr. Etter: That's right.

The Court: We got off the track here after it was identified.

Mr. Etter: Yes, I will move that that be admitted.

Mr. Rowan: No objection.

The Court: It will be admitted, then, Exhibit 27.

(Whereupon, the document was admitted in evidence as Defendant Defenbach's Exhibit 27.)

The Court: Are any of the others not admitted here, Mr. Taylor?

The Clerk: No, sir.

Mr. Rowan: If the Court please, may we have this formal objection on the record, that it is immaterial for our purpose?

The Court: Yes, the record may show that objection.

(Whereupon, oral argument was made to the Court by counsel for each of the respective parties, after which the following proceedings were had, to-wit:)

The Court: I haven't made up my mind about this case and I shall not do so until I have an opportunity to look at the authorities and, despite complimentary statements of counsel, I don't feel that I know enough about the laws of trust as applied to this particular case to decide [176] this off the cuff.

I am a little concerned here, I like to feel that

when I decide a lawsuit it is going to be finally decided and not go off on some question or issue other than the merits, and I am frankly a little concerned about the lack of showing here as to what creditors may remain unpaid or the amount of the creditors' claims that are covered by this assignment. It would seem to me that an assignment for the benefit of creditors could only be good to the extent of the amount of creditors' claims, and what is there here in the evidence in this cause in the record as to the amount that it would take for this trustee to pay out the creditors of this deceased?

Mr. Etter: All of the creditors' claims are attached in a schedule on the agreement and I can put the trustee on, if the Court wishes, and have him testify to that.

The Court: As I said, I assumed that there was a statement of creditors' claims attached to the assignment for benefit of creditors, but there has also been evidence of certain items turned over of personal property and there were certain loans on policies, and as to how much has been paid on these claims and how much the assets remaining amount to, I don't know.

I would prefer to permit you to re-open and show that definitely. I don't know whether it would prove to be material, but I at least want a little facts in evidence before [177] we submit the case.

I assume from what has been hinted here, at least, or perhaps stated that the amount of the

creditors' claims are more than the amount deposited into court.

Mr. Etter: It is far in excess of that.

The Court: Well, all right.

Mr. Defenbach: Do you wish me to address just the Court on this?

Mr. Etter: Just have the chair there.

The Court: You have already been sworn, it is not necessary to be sworn again.

RALPH B. DEFENBACH

having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Etter): First, I think the Court would like to know about the matter of loans that have been made on the policies. I think you testified that that money was taken into the trust fund?

A. Yes.

Q. Do you have that now? A. Yes.

Q. And have other monies been collected by the trustee?

A. You mean during the period of the [178] trust?

Q. Let's put it this way: At the time of the execution of the trust, these claims were made and attached to that trust agreement, is that correct?

A. Yes, the circumstances of the trust were this, if you would let me detail them.

Q. All right.

(Testimony of Ralph B. Defenbach.)

A. This is my own personal copy of this trust agreement that I retained. It is \$140,879.51.

The Court: Was that at the time of the assignment for the benefit of creditors?

A. On November 16, yes, at the time that I signed this.

The Court: All right.

A. Now on the morning that I signed this agreement, I went up to the Internal Revenue office with Mr. Weyen and with Mr. Oye, who is the manager of the Lorenz Lumber Company. The Federal government had a lien against certain logs in the possession of the Lorenz Lumber Company on account of indebtedness on the part of Bob Weyen to the Internal Revenue Department. Mr. Oye, as manager of the lumber company, owed Bob Weyen some certain amounts of money. In addition to the amounts that he actually owed, he made certain advances in the form of cash and that cash was turned over to me at that point and I wrote a check to the Federal government for the amount that they agreed they would accept as a release [179] of this claim.

Q. Do you remember how much that was?

A. No, I don't.

Q. All right.

A. I handled probably some hundred thousand dollars.

Q. What was that?

A. I handled probably a hundred thousand dollars during the period that I was in this trust. See,

(Testimony of Ralph B. Defenbach.)

we were conducting a logging operation and large amounts of supplies to pay for, stumpage to buy, labor to pay, current obligations to taxing agencies for various types of payroll taxes and other taxes.

The Court: Pardon me, then everybody can ask further questions, I am trying to shorten this. Could you tell us in round numbers approximately how much is the balance owing to the creditors?

A. There have been no payments made to any of the creditors listed on this statement.

The Court: Well, it would be \$140,879.00 and perhaps some accumulated interest?

A. That is right. Besides that, the assets that are listed in here are now of no value.

The Court: Well, I was just going to ask you a follow-up question on that. You say that is the amount remaining unpaid. What is the value of all the assets that might be [180] applied to the creditors?

A. There are no assets except what interest the trustee may have in these insurance policies.

The Court: I see. Any other questions, gentlemen?

I might say that, if you wish, the record may show an objection on your part to my permitting the re-opening of the case at this late stage, and the only purpose of it was to show the amount owing to the creditors. I am not going to consider it in any other respect.

Do you have any questions you would like to ask him?

(Testimony of Ralph B. Defenbach.)

Mr. Arnold: Yes. I not only object to the re-opening, and wish the record so to show——

The Court: That is what I suggested.

Mr. Arnold: I think that some of the statements made by Mr. Defenbach would bear a little cross examination.

The Court: You have the privilege.

Mr. Arnold: And perhaps the Court would be further enlightened.

Mr. Etter: I would like first for the record to show that counsel for Mr. Defenbach would have elicited this information except that we had no understanding that these people were making any claims so far as the matter of the trusteeship account on the debts owing was concerned. They have made none in this case and have given us [181] none here. I just say that in answer to counsel's objection to re-opening.

The Court: All right, go ahead. I think the Court has a pretty wide discretion in the matter of re-opening, I am not concerned about that.

Mr. Arnold: I am not either, your Honor.

The Court: All right, you may cross examine.

Cross Examination

Q. (By Mr. Arnold): Mr. Defenbach, the figures you gave to the court, one hundred forty thousand some odd dollars, were the claims listed at the time of the execution of the agreement on November 16th, 1954? A. Yes.

Q. That was nearly a year ago, wasn't it?

(Testimony of Ralph B. Defenbach.)

A. Yes.

Q. Have you made any accounting of any kind, nature, or description to anybody since that time, either of funds received and disbursed or property on hand or anything else?

A. Yes, the committee has an accounting.

Q. The committee? Who is the committee, anyway, of the parties to this action?

A. The committee that is recited in here and which are associated with me.

Q. It is true, is it not, that the executor [182] of the estate of Robert F. Weyen has demanded of you an accounting of the assets taken over by you as trustee through your counsel?

A. No, I don't think so.

Q. Through your counsel, Mr. Keeton?

A. No.

Q. Isn't that true? A. No.

Q. Now, Mr. Defenbach, I want to be fair with you. Are you sure that is not true? Let me ask that in a little different form——

A. Ask my counsel, because I haven't been advised of such a thing.

Q. Let me ask you if Mr. Feeney, attorney for the executor in the Idaho administration of this estate, has not demanded an accounting through Mr. Keeton, attorney for you as assignee?

A. You would have to ask Mr. Keeton that question, I couldn't answer it.

Q. Doesn't Mr. Keeton pass those demands on to you?

(Testimony of Ralph B. Defenbach.)

Mr. Etter: Well, now, I think that probably if he wants to ask Mr. Keeton, he can find out.

Mr. Arnold: Mr. Keeton is not on the witness stand. Let me finish——

Mr. Etter: He says he doesn't know, [183] Mr. Arnold. Why don't you call——

The Court: The answer is he doesn't know.

A. No, I am not aware of any such demand.

Q. (By Mr. Arnold): All right, there were quite a lot of timber contracts and property listed in that contract a year ago, was there not?

A. Yes, quite a lot of stuff listed here.

Q. But you have made no accounting except to the committee, is that right?

A. Yes, that is right.

Q. And a good many of the contract holders repossessed their personal property, did they not?

A. Yes, all of the equipment was taken over by contract holders.

Q. That also takes them out of the picture as creditors, does it not? A. Yes.

Mr. Arnold: I think that will be all.

The Court: Any other questions?

Cross Examination

Q. (By Mr. Rowan): Do you know anything about a \$7,500 item that was paid by you or anyone representing you in this matter?

A. \$7,500? Who would it have been to?

Q. Some machinery company? [184]

A. No, I think the only payments that have

(Testimony of Ralph B. Defenbach.)

been made to the machinery companies through this trust were on the monthly contract payments.

Q. And you know, too, that Mrs. Mary Weyen was paid some \$3,000, don't you?

A. Not out of this.

Q. Not out of that. You know also that over \$70,000 was collected after you took over the trust agreement, don't you?

A. You mean that that was the income?

Q. Yes, the total income?

A. Yes, might have been even more than that. I said I thought it was \$100,000.

Q. Was that applied upon the \$140,879?

A. Ask your question again, please.

Q. Was that amount of \$70,000 to \$100,000 applied upon the \$140,879.51?

A. Essentially, no, because——

Q. What do you mean by essentially?

A. Because any payments that we made on the conditional sales contract would reduce the amount that we owed on conditional sales contracts had we been able to live up to the continuation of the agreement, but we were unable to do that and the equipment was repossessed and we lost those amounts of money, so they couldn't be [185] reductions of indebtedness.

Q. The amount that was paid by you as assignee for creditors and then the property was lost after Mr. Weyen died? A. That is correct.

Mr. Rowan: I think that is all.

A. You see, this property passed into the hands

(Testimony of Ralph B. Defenbach.)

of Mr. Stanfill as the executor of the estate after Bob Weyen died. They were no longer in my possession.

Q. (By Mr. Rowan): It wasn't any longer in your possession? A. No.

Q. What were you doing, then, as assignee for the benefit of creditors after Bob's death?

A. I haven't done anything. I have had no funds to operate with. I haven't done anything.

Q. You have done nothing since his death, is that correct? A. That is——

Mr. Etter: He said he had no funds to operate with.

Mr. Rowan: I am asking if that is his answer.

A. As trustee for Bob Weyen, I had no funds to operate so I did not function.

Mr. Rowan: That is all.

The Court: Any other questions?

Mr. Etter: That is all.

The Court: That is all, then. [186]

(Witness excused)

The Court: As I say, that may be an excess of caution on my part, but I thought that that particular evidence should be in the record before we closed.

Is there anything else?

Mr. Etter: Yes, we would be prepared to submit some further authorities, if your Honor will permit. They have submitted a memorandum, if your Honor please, and if it is necessary——

The Court: I always welcome all the help that

I can get. If you have in mind submitting something that you haven't cited in oral argument.

Mr. Etter: That is correct.

The Court: I think the memorandum submitted by counsel appears to me from what opportunity I have had to examine it to be quite adequate and complete, and I would suggest that you have, say, a week. Would that be sufficient?

Mr. Etter: A week is enough.

The Court: To submit additional authorities, and you need not write a brief, just simply list your authorities and serve a copy on counsel, and then they will have an additional week in which to submit additional authorities, if they care to do so.

Is that acceptable, then, gentlemen?

Mr. Rowan: That is agreeable to me.

The Court: I wouldn't like extend this out [187] because I would like to get this decided without too much delay. But I will just give a week on a side then and I am beginning with the Defenbach defendant here because of the memorandum submitted already by you gentlemen. I will simply give them an opportunity to submit them and you can submit a reply list, if you wish to, within the additional week.

Is there anything else?

Mr. Arnold: I would like to make one comment limited entirely to the testimony given on the reopening.

I would like to say that the testimony given by Mr. Defenbach shows what the condition was approximately one year ago upon the execution of

this assignment. By his own testimony, he has done nothing since, he has paid nobody any money, he has permitted the property to escape and be squandered, but at the same time——

Mr. Etter: Just a minute——

Mr. Arnold: Just a minute now, I am talking.

Mr. Etter: I will object to your remarks, then.

Mr. Arnold: Permitted the property to be dissipated, and I will stand on that by his own testimony, that he has shown nothing on which this Court can gain any benefit from his testimony as to the amount of debts which might have been due either at the time of Bob Weyen's death or as of today. It is just out of date and it is sketchy and it is too remote and there are too many possibilities and shows us nothing in [188] the way of establishing any claim to these funds, and I will say particularly against the interests of the minor children.

The Court: I don't feel that I have Mr. Defenbach's report or the accounting of his conduct before me for passing upon it at this time. I have other troubles and other questions.

I will adjourn until tomorrow morning at 10 o'clock. [189]

[Endorsed]: Filed February 20, 1956.

[Endorsed]: No. 15080. United States Court of Appeals for the Ninth Circuit. E. J. Stanfill, as Trustee, and Elfrieda May, Appellants, vs. Ralph B. Defenbach, as Trustee, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed: March 19, 1956.

Docketed: March 28, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15080

E. J. STANFILL, as Trustee, and ELFRIEDA
MAY, Appellants,
vs.

RALPH B. DEFENBACH, as Trustee,
Appellee.

ADOPTION OF STATEMENT OF POINTS
AND DESIGNATION OF RECORD

E. J. Stanfill, as Trustee and Elfrieda May, Appellants in the above entitled action, hereby adopt the Statement of Points upon which they will rely herein and the Designation of record to be printed

as shown in the transcript of record sent up by the Clerk of the lower court and shown at pages 212 and 215 respectively of the typewritten transcript, as served upon appellee and filed in the Court below.

Dated this 24th day of March, 1956.

E. J. STANFILL

As Trustee, and

ELFRIEDA MAY,

Appellants

/s/ By S. DEAN ARNOLD,

/s/ By C. C. ROWAN,

Their Attorneys

Acknowledgment of Service attached.

[Endorsed]: Filed Mar. 28, 1956. Paul P. O'Brien,
Clerk.

No. 15080

**In The
United States Circuit Court of Appeals
For the Ninth Circuit**

<u>E. J. STANFILL, as Trustee, and ELFRIEDA MAY,</u>	}	Appellants,
<u>RALPH B. DEFENBACH, as Trustee,</u>		
		Appellee.)

vs

BRIEF OF APPELLANTS

Appeal from the United States District Court
for the Eastern District of Washington
Northern Division

HONORABLE SAM M. DRIVER
United States District Judge

S. DEAN ARNOLD
517 Sycamore Street
Clarkston, Washington

C. C. ROWAN
1021 Paulsen Building
Spokane, Washington

Attorneys for Appellants

FILED

JUN 11 1956

No. 15080

In The

**United States Circuit Court of Appeals
For the Ninth Circuit**

<u>E. J. STANFILL, as Trustee, and ELFRIEDA MAY,</u>	}	Appellants,
<u>RALPH B. DEFENBACH, as Trustee,</u>		
vs		
<u>Appellee.</u>	}	

BRIEF OF APPELLANTS

Appeal from the United States District Court
for the Eastern District of Washington
Northern Division

HONORABLE SAM M. DRIVER
United States District Judge

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QUESTIONS PRESENTED

1. Is the primary purpose of life insurance for the protection of surviving dependents?

2. Do not the minor beneficiaries under a trust agreement acquire a vested interest by use of the words "with absolute right vested in the trustee"?

3. Does the reservation in a life insurance trust to "pledge as collateral or exercise the loan rights" include the right to change the beneficiary?

4. Does a reservation in the alternative permit the exercise of both options?

5. Does not the reservation of a specific right exclude those powers not reserved?

6. Was not the Defenbach agreement subject to an irrevocable 15 year trust to Stanfill to protect children during their minority?

7. Is the Defenbach Agreement (Ex 27) a power of attorney, a mortgage, an operating agreement or an assignment for the benefit of creditors?

8. Was not the Defenbach Agreement intended to terminate upon the death of Robert Weyen?

9. Should not Appellant Elfrieda May in equity be returned the \$3,000.00 she paid to enable the creditors to secure the Defenbach agreement?

JURISDICTIONAL STATEMENT

THE SUN LIFE ASSURANCE COMPANY OF CANADA, instituted an action in District Court against appellants, appellee and others, interpleading all, and paying some \$63,500.00, proceeds of life insurance policies on the life of Robert Weyen, deceased, into court and requiring all defendants to interplead their rights. (R. 3). Appellants answered, claiming all the proceeds by virtue of a Trust Agreement (Ex 25) (R. 15) and appellee answered claiming all proceeds except those of the policy in Count I by virtue of the assignment to appellee, as Trustee. (Ex. 27) (R. 29).

Sun Life Assurance Company of Canada is a Canadian corporation; appellee is a citizen of the State of Idaho; Appellants of Oregon and California; and Mary P. Weyen of the State of Washington.

Jurisdiction of the District Court arises under the Act of June 25, 1948, The Judicial Code, 28 USC, Sections 1332, 1335, 1391 and 1397 and Rule 22 of the Federal Rules of Civil Procedure. Jurisdiction was not questioned.

Upon trial, without a jury, before Honorable Samuel M. Driver, Findings of Fact and Conclusions of Law, in favor of Ralph B. Defenbach, as Trustee, were made, and Judgment dated December 30, 1955 was entered accordingly. Upon motion timely made, the trial court, on January 19, 1956, denied appellants' Motion to Amend the Findings, Conclusion and Judgment. Notice of Appeal from that Judgment and from the Order Denying Motion to Amend, was duly served and filed February 15, 1956.

Jurisdiction of this court arises under the Act of June 25, 1948, 28 USC, Sections 1291 and 1294 (1). and under Rule 73, Federal Rules of Civil Procedure.

STATUTES AND RULES INVOLVED

28 USC 1332. Diversity of citizenship; amount in controversy

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interest and costs, and is between:

- (1) Citizens of a different State;
- (2) Citizens of a State, and foreign states or citizens or subjects thereof;
- (3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 USC 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of the interpleader or in the nature of interpleader filed by any person, firm or corporation, association, or society having in his or its custody or possession money or property of the value of \$500 or more, or having issued a note, bond, certificate, policy of insurance or other instrument of value or amount of \$500 or more, or providing for the delivery or payment of the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of \$500 or more if (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the

amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, c. 646, 62 Stat. 931.

28 USC 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

28 USC 1397. Interpleader

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one of more of the claimants reside. June 25, 1948, c. 646, 62 Stat. 936.

Rule 22—Federal Rules of Civil Procedure:

Interpleader.—(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Section 24 (26) of the Judicial Code, as amended, U.S. C., Title 28, Sec. 41 (26). Actions under that section shall be conducted in accordance with these rules.

Rule 73, Federal Rules of Civil Procedure

Appeal to a Court of Appeals

(a) When and How Taken.

“ The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders. . . . denying a motion under Rule 59 to alter or amend the judgment. . . . ”

STATEMENT OF THE CASE

(All emphasis throughout, ours)

The facts are undisputed. September 22, 1953, Robert Weyen, divorced his wife in Asotin County, Washington, Superior Court and was required by Court Order to pay \$200.00 per month for the support of minor children, then age 7 and 9, with custody awarded to the wife, and a property settlement made shortly before was approved by the court. (Ex 23). September 23, 1953, Weyen executed his Last Will and Testament, containing the following provisions:

“SECOND: I make no provision for my children, namely, Daryl Weyen and Carolyn Weyen, because I have heretofore provided for them through Insurance Policies on my life; however, should said polices lapse or become null and void I hereby give, devise and bequeath to my said children the sum of \$10,000 share and share alike”. (Ex 24).

On the same day, Weyen executed a trust agreement (Ex 25) conveying beneficial rights in certain insurance policies (no other property) to E. J. Stanfill, in trust for fifteen years for the benefit of said minors. The agreement is designated “Trust Agreement”. It contains no power of revocation in whole or in part. It directs the trustee to

“hold and administer the said insurance policies and the proceeds thereof”

and then contains the following provisions:

“4. All proceeds of said policies, inclusive of all rights to take and receive payment of cash, surrender or loan payments and all dividends or distributions payable either to the insured or the beneficiary, shall be payable and be paid to the Trustee, and no insurance company issuing any such policies, or making any such payments shall be responsible for or be required to look to the proper discharge of the trust hereof or the application of such payments by the Trustee, and with the absolute right vested in the Trustee to pledge any such policy as collateral, surrender the same either for cash of paid-up insurance value or avail itself of any option granted in any such policy to the insured and his assigns, without the signature or assent of the donor.”

It also provides:

7. “The donor specifically reserves the right, during the term of this trust, to pledge any of such policies as collateral ‘or’ to exercise the loan right as provided in said policies, and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the Trustee named herein shall not be required to join in the application for said loans.”

The trust contains no other reservation and no right of revocation.

The sole “Trust Res” was the beneficial rights in the policies, in case of death, and ran for fifteen years only.

The insurance company issuing the policies was furnished a copy of this trust agreement and their printed form for change of beneficiary was executed by Weyen, and Stanfill was formally made the beneficiary of the policies for the benefit of the minor children. (R. 122, 147)

Stanfill and Defendant Elfrieda May (the mother of Weyen) held the policies for some time and paid the premiums hereon. Weyen had borrowed against some of these policies before execution of the trust (Exhibit 1, 2, 3 & 4.) (R. 129)

In November, 1954, Weyen executed an instrument designated "Assignment to Trustee for Benefit of Creditors" to Ralph B. Defenbach, in which he assigned certain moneys, credits, equipment and timber contracts under an operating agreement, directing Defenbach to collect all income and pay out all funds in accordance with the directions contained therein. (Ex. 27)

After directing the collection and application of the income, and apparently as an afterthought as to future borrowing against the policies, the instrument recites that Weyen has the insurance policies above named and others, and,

"has prepared the necessary documents to have party of the second part herein named his beneficiary for the benefit of the creditors joining in this assignment. . . ." (Ex. 27.)

However, Weyen executed only an assignment of the policies to Defenbach though stating by letter that the purpose of the assignment was to change the beneficiary. The company never formally changed the beneficiary to Defenbach nor were change of beneficiary forms ever executed. (R. 124). Assignee Defenbach subsequently exercised the loan rights on four policies (Ex. 5, 6, 7 and 8), being the policies on which Weyen had not previously borrowed money. (R. 129)

The agreement with Defenbach provides:

“The Party of the First Part does hereby agree that this assignment shall constitute a Power of Attorney to Party of the Second Part to act in his behalf insofar as it may be required to carry out his duties under the terms of this assignment. . . .”

It also provides:

“The Party of the First Part agrees that this assignment shall constitute a mortgage upon all of the property listed herein.”

Weyen died from an accident April 16, 1955.

Weyen's mother paid premiums on some of the policies at Weyen's request, because she had possession and understood that would protect her; she paid indebtedness of Weyen's of \$3,000.00 before the Defenbach Agreement could be executed, and as a part thereof (R. 183, 184) and claims an equitable lien upon the policy proceeds.

Each policy involved (Ex 1-8) contains separate provisions and terms for change of beneficiary and for assignment reserved to the insured. These rights of the insured became vested in Stanfill by the Trust Agreement (Ex. 25) except those specifically reserved in paragraph 7 thereof; those reserving to Weyen only the right to "pledge. . . . as collateral" or, in the alternative, to "exercise the loan rights". Nothing passed to Defenbach except what was specifically reserved. At the time of the execution of the Stanfill Trust on September 23, 1953 the loan rights had already been exercised on Exhibits 1, 2, 3 and 4. After the Assignment to Defenbach and in February, 1955, Defenbach used the alternative reservation by exercising the loan rights on Exhibits 5, 6, 7 and 8 (R. 129, R. 175). At the time of Weyen's death, he and Defenbach had previously exercised all the rights reserved to the insured.

SPECIFICATIONS OF ERROR

I.

The court erred in that portion of Findings of Fact No. VI, reading:

“... the necessary documents were prepared and the assignor delivered the policies to Defenbach for forwarding to the home office of the companies issuing said policies so that appropriate endorsements might be attached thereto showing Defenbach as beneficiary thereunder. . . .”

II.

The court erred in that portion of Finding No. VIII, reading:

“... It was not necessary for him to change the beneficiary in order to accomplish that purpose; that in executing the Assignment to Trustee for Benefit of Creditors dated November 16, 1954, Robert F. Weyen intended to pledge his assets including his life insurance as security for the payment of his debts”

III.

The court erred in Conclusion of Law No. First, reading:

“That the seven (7) insurance policies involved in this action and assigned to Ralph B. Defenbach by their language recognize the right of the insured to assign the same and that under the terms of the trust agreement dated September 23, 1953, Robert F. Weyen reserved the right to pledge any of such policies as collateral; that the defendant Ralph B. Defenbach therefore will recover the net proceeds of all life insurance policies impleaded herein except Policy No. 1 477 698, which was assigned to Elfrieda May”.

IV.

The court erred in that portion of the judgment entitled "first" awarding Ralph B. Defenbach, trustee, all the net proceeds of the seven policies listed.

V.

The court erred in construing the Stanfill Trust, Exhibit 25, to be revocable as against Weyen's minor children, the cestui que trust.

VI

The court erred in holding the Stanfill Trust did not immediately vest an interest in Weyen's minor children for fifteen years as to the beneficiary of the insurance policies conveyed in trust.

VII

The court erred in holding the Defenbach assignment, Exhibit 27, covered the proceeds of the policies involved, upon Weyen's death.

VIII.

The court erred in refusing to allow Elfrieda May and E. J. Stanfill, as trustee, the \$3,000 paid to Weyen's creditors to enable them to obtain the Defenbach agreement.

SUMMARY OF ARGUMENT

On September 23, 1953 Weyen established a 15-year irrevocable insurance trust in favor of his minor children (Ex. 25). He caused the beneficiary of the several policies (Ex 1-8) to be changed to the Trustee and delivered the policies to the Trustee, thereupon fully executing the Trust conveyance. By conveying for 15 years he suspended his right to change beneficiaries or do anything else with the policies, except as reserved to himself in paragraph 7. Paragraph 4 of the Trust Agreement gives Stanfill "rights to take and receive payment of cash, surrender or loan payments or all dividends or distributions payable either to the insured or the beneficiary. . . . with absolute right vested in the Trustee to pledge any such policy as collateral, surrender the same either for cash of paid-up insurance value or avail itself of any option granted in any such policy. . . ."

The key to this litigation rests on the interpretation of paragraph 7 of the Trust Agreement, quoted as follows:

"The donor specifically reserves the right, during the terms of this trust, to pledge any of such policies as collateral or to exercise the loan rights as provided in said policies, and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the Trustee named herein shall not be required to join in the application for said loans."

This paragraph read in its entirety only reserved to Weyen the right to borrow by one of two alternative methods: to exercise the loan rights with the company or to pledge the same to another loan agency or

procure a bank loan thereon. Loans on policies as a practical matter are limited to cash surrender value. It will be noted also that the reservation is in the alternative. The Trust Agreement did not reserve:

1. The right to revoke.
2. The right to change beneficiary.
3. The right to surrender for cash.
4. The right to destroy the protection extended to the minor children for the 15 year duration of the Trust.

Weyen's intent to protect his children against everything but the loan value of the policies is clearly expressed in the Trust Agreement and confirmed by his Last Will and Testament (Ex 24) which otherwise disinherited his children except in the event of lapse of the policies.

As further confirmation of his intent, he caused the Trust Agreement to be recorded.

The subsequent assignment to Defenbach is ineffectual to carry the ultimate beneficiary death payments for two reasons:

1. The insured Weyen did not reserve the right to change the ultimate beneficiary for 15 years but only the right to borrow the cash surrender value, and,
2. The reservation contained in paragraph 7 was in the alternative to pledge or exercise the loan rights.

Weyen had already exercised the loan rights on the four policies (Ex 1-4) and Defenbach subsequently exercised the loan rights on the four remaining policies (Ex 5-8) thus both Weyen and Defenbach by their respective elections foreclosed themselves of the right to pledge. By reserving specific rights the Trustor Weyen excluded all other reservations. Expressio Unius Ex Exclusio Ulterius.

Appellant is relying upon the strength of his own case as above set forth, but nevertheless points out the weakness of Appellee's position:

1. The Defenbach Agreement has never been construed as to whether it is a mortgage, a pledge, a power of attorney, an assignment for the benefit of creditors or an operating agreement terminating upon the death of Weyen.

2. An assignee for the benefit of creditors is never a bona fide purchaser. Accordingly, Defenbach took with constructive notice of the prior 15 year Stanfill Trust.

3. Even so, Defenbach paid no consideration therefor. The proceeds of the policy loans to Defenbach exceeded the premiums paid thereon by Defenbach (R. 171). Elfrieda May advanced \$3,000.00 to creditors (R. 184) at the time of the Defenbach assignment and paid the attorney fee therefor. (R. 181)

4. Defenbach has made no accounting to determine the value of the assets other than insurance or to show the need for funds.

5. The Defenbach transaction attempts to do indirectly what it cannot do directly, that is, change the beneficiary under the guise of an assignment.

The control of the policies by the insured, while absolute at the outset, may be limited in those instances where the insured by his own act has barred his own right of control by creating an irrevocable vested interest in others, as he has done here.

Since this is an equitable action, the \$3,000.00 advanced by Elfrieda May in cash to Weyen and his creditors to pay life insurance premiums and other obligations should in good conscience and equity be awarded to her.

ARGUMENT

Specifications of Error I to IV, inclusive, all involve the construction of Exhibits 25 and 27 and in particular whether Exhibit 25 is a "Trust Agreement" and for convenience are all discussed together.

The insurance contracts provide:

"Subject to the rights of any assignee of record. . . . the contractor may assign or pledge. . . . every right. . . . conferred by the policy".

Stanfill was already the Trustee—beneficiary of record when Weyen attempted to assign to Defenbach. Therefore under the insurance contract itself the Defenbach assignment was subject to the rights of Stanfill as trustee (and of course the minor children) and since Weyen had not reserved the right to change the beneficiary in the Stanfill Trust, he could not make Defenbach the beneficiary. Weyen clearly intended to protect his children for fifteen years in the event of his death regardless of what might occur. He used expressive language in so doing. For example "the absolute right vested in the Trustee" even to surrender for paid up policy. He reserved the "accumulations" or the "loan rights" to himself so that he could borrow thereon from time to time but indicated no intention to reserve the right to change beneficiary. He could borrow against the policies or he could pledge them as security to borrow against them but he could not defeat the rights of the minor children. Weyen reserved the right "to borrow or to pledge" but did not reserve (1) the right to revoke in whole or in part, (2) the right to change beneficiary, (3) the right to surrender for cash, (4) the right to do

anything that would destroy the protection given the children, or (5) the right to assign to another, except for loan purposes.

Weyen intended to protect his children until they were of age if he should die. He retained the earnings or accumulations on the policies for himself and his creditors but not the beneficial rights in case of death.

The trial court overlooked the fact that the insurance contracts between the Sun Life and Weyen clearly distinguished between (1) the loan rights, (2) the death benefits, (3) the right to change beneficiary and (4) the right to assign. The policies contained separate and distinct paragraphs limiting each right. Weyen was required to use the form of the insurance company to change beneficiary in order that the company might stop a further change after the policies had been assigned. The policies so provide. Weyen had conveyed to Stanfill as trustee by Exhibit 25 and under the policies any change of beneficiary was "subject to the rights of Stanfill as Trustee". Weyen used the company form when naming Stanfill as trustee but did not do so as to Defenbach. Without doubt the company would not have honored any such change because it was in violation of the insurance contract, and the trust agreement.

The trial court also overlooks the fact that the usual insurance policy distinguishes between the rights of the insured and the rights of the beneficiary. The latter are not exercised until the insured is deceased and once a trustee is made the beneficiary in a trust not revocable, all rights of the insured thereafter are "subject to the rights of such trust beneficiary".

The insurance contract recognizes Weyen's right to assign from time to time but not after he has already conveyed in trust without reserving the right to revoke.

Specifications V and VI both involve the construction of the Stanfill Trust, (Ex. 25) and are discussed together.

IRREVOCABILITY

A trust created is irrevocable even though voluntary.

Holmes v. Holmes, 65 Wash. 572, 118 Pac. 733

28 Am. Eng. Encyc. Law (2d) pg. 899

32 L. R. A. (NS) 645.

The Washington court recently said:

"The insured had made an equitable assignment of the policy to respondent in 1932. . . . It is true that no formal assignment of the policy was executed as required by. . . . the policy. . . . but. . . . it was the insured's intention on October 28, 1932 to transfer to respondent a present interest in the ultimate proceeds of the policy. . . . the fact that the insured thereafter. . . . was. . . . enabled to procure a change of beneficiary cannot be held to operate to divest respondent of the rights theretofore vested in her. . . . there was in this instance, not only a good consideration, found in the relationship of the parties, in the. . . . insured's motives of natural duty and prudence. . . . The agreement was valid and fully performed. The insured could not thereafter repudiate it, as he apparently attempted to do. . . . His attempted change of beneficiary was ineffectual as to the respondent. . . ."

Sundstrom v. Sundstrom, 15 Wn. (2d) 113, 116

The dissent of the present District Judge, then an Associate Justice of that court was because the agreement was oral and was supported only by respondent's testimony but this case has never been overruled. Here Appellant's proof is in writing, acknowledged and recorded.

Since jurisdiction in the instance case is based upon diversity of citizenship of the parties, the governing substantive law is that of the State of Washington.

"In these modern, complex times, the right of every man to use his accumulations to pay his debts, especially when he has pledged them to obtain liquid capital, ought not to be limited or abridged,

except only in those instances where, by his own act, he has barred his own right of control by creating an irrevocable vested interest in another or others.

Life insurance, during the life of the insured forms a reserve to be drawn upon in times of stress and many have improved their fortunes and bettered the condition of their dependents by drawing liquid capital from that source to enable them to maintain or renew their business activities."

Mass. Mutual v. Bank of Cal. 187 Wash 565

The above quotations state the general rule, the exception and the explanation. The trial court based its decision upon the general rule. Appellant relies upon the exception voiced in the second section. The third portion justifies the first in its justification limits it to the practice of "drawing liquid capital."

The only liquid capital to be drawn on a life insurance policy must be drawn during the life of the insured, and should not be confused with those benefits arising only after death.

There is no implied power in the settlor to revoke or modify a trust. The settlor cannot revoke the powers reserved and the consent of minors to revocation cannot be obtained.

Simon v. Reilly, 10 Atl. (2d) 474

Bogert on Trusts, Vol. 4 (1) para 993

Since neither the settlor nor the trustee acting individually can revoke a trust, neither can they do it together. A mere agreement to do so is ineffective.

Morrison v. Nugent, 36 N.E. (2d) 581

Bogert on Trusts, Vol. 4 (1), para 1001

Even a power reserved to the settlor to demand and receive from time to time, a part of the corpus of a trust for his own personal needs, is proper as reserving the right to a partial revocation but it cannot be used as a subterfuge for a complete revocation.

Lovett v. Farnham, 47 N.E. 246

Bogert on Trusts, Vol. 4 (1), para 993

It is a general rule that where a valid and effective voluntary trust has been created, and no power of revocation has been reserved, it cannot be revoked by the creator without the consent of the beneficiaries thereunder.

Stoehr v. Miller, 296 Fed. 414

Roberts v. Taylor, 300 Fed. 257

At any rate the court interprets the contract made by the parties and does not attempt to make a better one.

In re Wilson, 256 Fed. 966

Collins v. Northwest, 180 Wash. 347

The general rule is that where a valid and effective voluntary trust has been created, and no power of revocation has been reserved, it cannot be revoked by the creator without the consent of the beneficiaries thereunder.

Adams v. Hagerott, 34 F. (2d) 899

Taylor v. Bunnell (Calif.) 23 P. (2d) 1062

The court awarded a trust estate to the plaintiff as the heir at law of the trustor, for the reason, inter alia, that the trustor, having once established the trust, could not revoke it, since there was no power of revocation reserved in the trust agreement.

Fry v. Pence (1931) 261 Ill. App. 218

The trustor had established a valid trust which he could not revoke merely because he had had a change of heart or because he felt that he had done something which he desired to undo.

Price v. Price, 162 Md. 656

The interest of the plaintiffs in the trust property had vested and the trustor could not revoke the trust without the consent of the beneficiaries.

Ketcham v. Miller, 37 S. W. (2d) 635

The trust being thus perfectly created, and there being no power of revocation reserved, the trustor

could not, by his subsequent acts, affect it.

Hamilton Trust Co. v. Bamford, 105 N.Y.Eq. 249,
147 A. 909

A trustor cannot revoke a trust the income of which she was to receive for life.

Pickett v. Geer, 156 S. C. 346, 153 S. E. 349

The court is relegated to determining from all the evidence what the trustor then wanted done with the fund under all the circumstances. Obviously, Stalder's last will, that is, the will he actually left in force, would be very relevant to such an inquiry.

Stalder v. Pacific National Bank, 28 Wn (2d)
644, 648

2 Restatement of Law of Trusts (see pg. 337) says:

"Even though they all (the beneficiaries) consent, they cannot compel the termination of the trust if its continuance is necessary to carry out a material purpose of the trust."

Since the Trust Agreement and the Will were to "effect a single purpose", they must be construed together to determine the intent of the parties.

Fowler v. Lanpher, 193 Wash. 315.

Insurance trusts in favor of settlor's family are preferred over the claims of creditors.

In re Bosck, 12 Fed. Supp. 279.

THE INSURED'S INTENTION IN ASSIGNING SHOULD ALWAYS CONTROL.

Mutual Benefit Life v. Clack, 254 Pac. 306 (Calif.)

The following facts are significant:

A. The minor children were made the beneficiaries (through Stanfill as Trustee) for fifteen years absolutely.

1. Absolute rights vested in Stanfill as trustee.

2. Admittedly something was conveyed because Stanfill was required to reconvey to Weyen at the end of a fifteen year term.

3. Loan rights (accumulations) and right to pledge therefor, are the only reservations in donor.

4. No power of revocation was reserved in whole or in part.

5. Donor's intent, at the time trust was made, governs.

B. This beneficial interest vested in the minors immediately and could not be taken from them without consideration.

C. No right to change the beneficiary was reserved —Expressio Unius ex exclusio ulterius.

D. Weyen's Will and his recording of the Stanfill Trust and furnishing the insurance company with copy of the Stanfill Trust, all conflict with the trial court's decision.

The use of the word "or" in the reservation in paragraph 7, (Exhibit 25) left Weyen and his assignee, Defenbach, only an alternative. The word "or" is a coordinating participle that marks an alternative, meaning one or the other, but not both.

30 Words & Phrases, 1956 Sup. p 20 The word "or" is used in the sense of "and" only when the obvious sense requires it. 30 Words & Phrases, 1956 Sup. p 69.

Without resorting to voluminous citations it would appear that in statutory construction the Courts are more inclined to use the words "and" and "or" interchangeably but that in private contracts the words are given their respective strict construction unless necessary to give sense to the instrument being construed.

"Where testamentary trust provided that testator's married daughters, respectively, should have use and 'possession' of, 'or' 'rents and Profits' accruing from, lands described, trustees had power of election between alternative benefits, since word 'or' could not be properly construed as 'and'. Word 'or' is defined as a co-ordinating particle that marks an alternative. . . ."

Lancaster v Marshall (Neb) 264 N.W. 470, 475

Since Weyen's original intent was to protect the children in case of his death, and he confirmed this in his Will of the same date and emphasized it by recording the Trust Agreement and giving the insurance company a copy, and particularly since he reserved the right to borrow or pledge the policies but did not reserve the right to change beneficiaries or surrender the policies for cash, it is clear he then intended the trust to be complete and irrevocable for fifteen years as to beneficiaries and any attempted change of beneficiary to Defenbach was beyond his power.

VESTED INTEREST OF MINORS

COURTS CONSIDER THE PURPOSE OF LIFE INSURANCE IS TO PROVIDE FOR THE MAINTENANCE OF THOSE SURVIVING THE INSURED AND DEPENDENT ON HIM.

2 Appleman on Insurance 760

The vesting of estates is favored in the law.

Seattle First Natl. Bank v. Crosby, 42 Wn (2d) 234

Where a policy of insurance is made payable to a child, it acquires a vested interest immediately upon the execution of the contract.

2 Appleman on Insurance 315

A policy taken out pursuant to agreement cannot be changed without the consent of beneficiary.

Wellhouse v. United Paper Co., 29 F (2d) 886

2 Appleman on Insurance 324.

The trustor executed a trust agreement for the benefit of her two children, and transferred 100 shares of stock as the trust res to the trustees. Later, she executed a purported trust in the exact language of the prior trust, except that, instead of 100 shares of stock being placed in trust, there were only 60 shares. The court held that the first trust, being a complete, executed voluntary one, without the power of revocation having been reserved, was a valid trust and the second trust was void.

Krause v. Jeannette Invest. Co. 62 S. W. (2d) 890

In Hurt v. Gilmer, 59 App. D. C. 282, 40 F. (2d) 794. the trustor and the immediate beneficiaries of the trust attempted to revoke it by mutual consent. The trust instrument provided that, at the expiration of a life estate, the corpus of the trust should go to the beneficiaries named therein, and in the event that any of the persons entitled to share in the remainder should pre-decease the beneficiary having a life estate, then the deceased remainderman's share should be

paid to her issue. The court held that this possibility of other beneficiaries coming into existence precluded the revocation of the trust by the mutual consent of the persons named therein.

A vested interest may prevent an assignment.

Potter v. Northwestern Mutual, 247 N. W. 669

An equitable interest may do likewise.

Aetna Life v. Morlan, 264 N. W. 58

An antenuptial agreement is a sufficient consideration for acquisition of a vested interest.

Kansas City Life v. Jones, 21 F. Supp. 159

A trust can be terminated in the lifetime of the settlor, by agreement of all parties, if beneficiaries are of full age.

Fowler v. Lanpher, 193 Wash. 308, 75 Pac. (2d) 132

A trust cannot be terminated by the trustee.

54 Am. Jur.—Trusts, Para. 77

If a trustee is not relieved by the beneficiaries, he must have court sanction.

54 Am. Jur.—Trusts, Para. 129

A trustee cannot be relieved where beneficiaries are minors or incompetents.

54 Am. Jur.—Trusts, para. 128

A life insurance policy for benefit of daughter, gives daughter a vested interest immediately upon delivery to father (insured).

Geoffrey v. Gilbert, 49 N. E. 1097 (N.Y.)

Johnson v. Roberts, 254 Pac. 88 (Okla)

A trustee having accepted, cannot divest himself of the office. A formal written resignation is ineffective.

Bogert on Trusts, Vol. 4 (1), para 511

Resignation by consent is impossible if beneficiaries are infants.

Bogert on Trusts, Vol. 4 (1), para 513

It is therefore not within the power of the trustor and her daughter together to alter or revoke the instrument, nor within the authority of the court to do so, since by the express terms of the trust others have a contingent right under it.

Underhill v. U. S. Trust Co., 227 Ky. 444,
13 S. W. (2d) 502

The trustors and the remaining beneficiary, desiring to revoke the trust, entered into a written revocation. Held, the trust was not revocable by the parties to the trust instrument, since it created a remainder in the next of kin of the trustors.

Whittemore v. Equitable Trust Co. 250 N.Y. 298,
N.E. 464

Weyen's obligation to protect and support the children in the event of his death, the same as the \$200.00 monthly payment while he lived, was sufficient consideration for assigning the policies in trust to Stanfill and making Stanfill, as such trustee, the beneficiary, until the children were of age.

Fowler v. Lanpher, 193 Wash. 308

The Stanfill Trust clearly spells out: "I hereby vest absolutely in you, the right to collect and pay out the

proceeds of these insurance policies, if I die within fifteen years”.

If Weyen had intended to reserve the “right to change beneficiary” and the “right to surrender for cash”, or the right to revoke or even to assign or sell, he would have said so in Paragraph VII of the trust agreement.

EXPRESSIO UNIUS EX EXCLUSIO ULTERIORIS

The trust was created for only fifteen years to protect the children until they were of age. The policies then reverted to Weyen in their entirety. All he reserved for 15 years was the right to use the “loan privileges” or the right “to pledge” the policies, the latter of which would carry the protection of the loan rights. That is all Weyen had reserved and hence all he could convey to anyone else. If the premiums were paid, the minors were protected as to the proceeds in the event of death, less the loans outstanding against the policies as provided in the insurance contracts.

The trial court, in order to emphasize the meaning of “the right to pledge or to exercise the loan rights” pointed out that the Stanfill Trust was “drafted by a lawyer”. Therefore, we point out that the same lawyer inserted the word “or” instead of “and” as well as the language “with the absolute right vested in the trustee to pledge any such policy. . . . surrender the same either for cash. . . . or avail itself of any option. . . . without the signature or assent of the donor.” The word “vested” must be given some meaning or held meaningless. If Weyen retained full control over the beneficiary, the pledge, the loan and all other rights, then the word “vested” is meaningless.

Nor should we disregard the fact that Weyen and his attorney, while specifically naming the rights he wished to reserve for some reason did not include either "the right to change beneficiary" or "the right to surrender for cash" or the "right to revoke" nor the "right to assign or sell". Clearly Weyen did not retain the authority to destroy the interest of the minors in the policies nor to retain exclusive jurisdiction over all of them—if so, then the trust is entirely meaningless and is nothing but a declaration of intention, revocable in its entirety.

The fact that he recorded the trust in Asotin County also indicates an intent to place it beyond his power to deprive the children of their "vested rights". His furnishing a copy to the insurance company shows his intention to make the "beneficial interest" irrevocable for fifteen years. Likewise, his will indicates his intention to protect the children, through the death benefits, for he did not make any provision as to the children if he "assigned or pledged" the policies.

The Stanfill Trust, in effect, says: "I vest in Stanfill absolutely, as trustee for my children, for fifteen years, the right to collect the proceeds of these policies and pay them out to the children as follows: (Then he gives explicit instructions for disbursing such proceeds). . . . Neither I nor my creditors can surrender the policies for cash, nor collect the proceeds if I die within 15 years. I reserve the right to borrow against the policies at any time or to pledge them to anyone else to do so". The he said, "I am recording this instrument so that neither I nor my creditors can deprive my children of this protection, even if this instrument is lost, or my creditors assail me, if I die

before the children are of age", and his will confirms the above intent.

THE TRIAL COURT'S DECISION MAKES THE STANFILL TRUST REVOCABLE IN WHOLE without any provision as to revocation even in part. In other words, the court construes the reservation of the right to pledge or borrow as a right to revoke completely as to beneficiaries and otherwise and thereby revoke the trust completely.

The only authority to Stanfill to convey to anyone is at the end of fifteen years (Paragraph VI). Note too, that Paragraph VI requires a "CONVEYANCE" back to Weyen.

SPECIFICATION NO. VII

Exhibit No. 27 was also drafted by a lawyer. The instrument states that Weyen is indebted to many persons and is willing "to convey all his property and future income along with all securities". At that point he does not mention the insurance policies or proceeds. His property and future income did not include the beneficial rights of the policies which had been conveyed in trust to Stanfill, but only the right to borrow against the policies or to pledge as collateral, clearly indicating an intent that Weyen could either borrow against them or could pledge them with someone else who would receive any such borrowed money but not that he could borrow against them, and then convey something else, or he would have used the word "and". It is significant that the lawyer used the word "or" in the reservation of rights but it is clearly explained by the foregoing reasoning.

Thereafter, in the Defenbach argument and apparently as an afterthought, he listed the insurance policies and states his intention of making Defenbach the beneficiary. But it should be noted he never signed the Sun Life forms for change of beneficiary and Sun Life was not authorized to change the beneficiary until this was done under the insurance contracts. (Ex. 1-8)

Parol evidence may be offered to prove that a written assignment absolute in form, was intended only as security.

Dixon v. National Life, 46 N.E. 430.

And this is true even though the evidence is contrary to the clear and unambiguous language of the assignment.

Jordan v. N.Y. Life, 150 So. 419

The trial court treats life insurance as a piece of personal property—with only a single right in the insured—e. g. “Weyen intended to pledge his. . . Life Insurance.” (Memo. Opinion R. 71)

An insurance policy is a contract, a chose in action. It consists of several rights in the insured:

1. To cancel or discontinue premium payments and terminate the contract.
2. To surrender for cash in accordance with contract provisions.
3. To borrow against it, up to its loan value, as contracted.
4. The beneficiary's rights, upon death.

The right to pledge arises by operation of law; it is

a property right. One can pledge anything he owns. He cannot pledge something he has already transferred.

Weyen had already transferred to Stanfill, as trustee for the minors, the beneficial rights. He could not pledge those. He had continuing and increasing loan rights—he could pledge them—and he did to Defenbach. After he pledged them to Defenbach, Weyen could not thereafter borrow on them for he did not reserve the right to borrow in the Defenbach agreement.

Defenbach could not obtain something Weyen did not have—the beneficial rights for fifteen years.

Furthermore, the insurance contract does not permit a change of beneficiary after there is “an assignment of the policy” and Weyen had already assigned these policies to Stanfill, before he attempted to make Defenbach the beneficiary.

Now, if Weyen had lived fifteen years, the Stanfill Trust would have expired and Stanfill would have reconveyed to Weyen and Defenbach would have then come into all of Weyen’s rights under the policies, including the beneficial rights.

THERE IS A SHARP CONFLICT OF AUTHORITY AS TO WHETHER AN ASSIGNMENT CHANGES THE BENEFICIARIES OF AN INSURANCE POLICY. A MAJORITY OF THE RECENT CASES HOLD THE ASSIGNMENT DOES NOT CHANGE THE BENEFICIARY AND COURTS ARE RELUCTANT TO PERMIT ASSIGNMENTS AS SECURITY FOR A LOAN TO AFFECT A BENEFICIARY.

2 Appleman on Insurance, 403.

Anderson v. Bank, 109 A. 205

Douglas v. Equitable Life, 90 So. 834

Deal v. Deal, 69 S. E. 886

This is logical for usually the beneficiary is not the insured.

Where the will designates a beneficiary other than the executor named in the policy as such, the will should govern.

134 N.Y.S. 553. In re Milmine

An instrument should be interpreted by its "four corners" and it is clear the Defenbach agreement did not contemplate Weyen's death at all but was intended only as an operating agreement. It is entirely silent as to what Defenbach should do with the proceeds of these insurance policies or with any other property, after Weyen's death. On the other hand, the Stanfill Trust expressly provides a procedure for collection and payment of the proceeds of the policies by Stanfill in the event of Weyen's death within fifteen years.

The Defenbach agreement indicates the parties intended to pledge or mortgage the insurance policies, to give Defenbach control over Weyen's income and right of borrowing against the policies.

Paragraph XII of the Defenbach agreement even provides that under certain conditions, he (Weyen) will agree to and join with Defenbach "if ordered by a vote of a majority of the creditors' committee." How could Weyen join with Defenbach in doing anything with the insurance policies or proceeds after his death? Clearly, the Defenbach agreement was in-

tended to end with Weyen's death. It states it is a Power of Attorney, which of course expires with death. While it states it is a mortgage, if so, this also makes it a lien only UPON SUCH PROPERTY AS WEYEN HAD.

Its language indicates it is nothing but a managerial operating agreement to control income and expenditures, including the borrowing rights of Weyen on insurance policies, during Weyen's life time. It is headed an "Assignment for Benefit of Creditors" but the body of the instrument determines its legal effect. In this case it is a lien UPON WEYEN'S PROPERTY and a managing agreement during life, for the benefit of the creditors joining in the agreement.

Appellants maintain that Exhibit 27

A. was intended as an operating agreement through the life of deceased.

B. Could not assign something Weyen had not reserved and did not have.

C. provides for no disposition whatever of the proceeds of the policies upon Weyen's death and gives Defenbach no instructions whatever for action after Weyen's death.

D. Expressly states it is a Power of Attorney—a Mortgage.

E. can be construed only as an assignment of the right to exercise the borrowing privileges.

F. could not change the beneficiary since the policies had been assigned to Stanfill in trust and any change thereafter was "subject to such trust assignment".

SPECIFICATION NO. VIII--EQUITY OF MRS. MAY

This is an equitable action and the court will protect the equities of all parties.

Defenbach, at the very most, should not be permitted to have the benefit of the \$3,000.00 paid by Mrs. May to enable the creditors to secure the Defenbach agreement. Since Mrs. May has specifically pleaded all her rights herein in favor of the minor children, we respectfully suggest that the clerk should be ordered to pay such funds to Stanfill, as trustee for the children.

McConnell v. Henocksberg, 11 Tenn. App. 176

CONCLUSION

For the foregoing reasons the Judgment of the court below should be reversed and the proceeds of all policies directed to be paid to E. J. Stanfill as Trustee for the minor children.

Respectfully submitted,

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No. 15080

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

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Appellants,

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Appellee.

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Appellee's Answer Brief

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JURISDICTION

This action was brought by the Sun Life Assurance Company of Canada as an interpleader action against Mary P. Weyen, individually and as guardian of Daryl Weyen and Carolyn Weyen, minors, Elfrieda May, Ralph B. Defenbach as Trustee, E. J. Stanfill as trustee, E. J. Stanfill as executor of the estate of Robert Francis Weyen, deceased (Tr. 4-15). The Sun Life Assurance Company of Canada is a Canadian corporation. Mary P. Weyen and her minor children, Daryl Weyen and Carolyn Weyen, are residents of the state of Washington (Tr. 4); Elfrieda May is a resident of Los Angeles, California, and a citizen of the state of California (Tr. 5); Ralph B. Defenbach is a resident of Lewiston, Idaho, and is a citizen of the state of Idaho (Tr. 8); E. J. Stanfill is a resident of Enterprise, Oregon, and is a citizen of the state of Oregon (Tr. 5). The amount in controversy exceeds \$500.00 exclusive of interest and costs, to wit the sum of approximately \$63,500.00 (Tr. 4-15). Jurisdiction of the District Court exists under the Act of June 25, 1948, Ch. 646 (62 Stat. 930, 28 U.S.C.A. 1332; 62 Stat. 931, 28 U.S.C.A. Sec. 1335; 62 Stat. 936, 28 U.S.C.A. Sec. 1397; 62 Stat. 970, amended May 24, 1949, Ch. 139, Sec. 117, 63 Stat. 105, 28 U.S.C.A. Sec. 2361), and Rule 22 of the Federal Rules of Civil Procedure.

Judgment was entered in favor of appellee against appellants on December 30, 1955. On January 19, 1956, the trial court denied a motion to amend the findings, conclusion, and judgment. The motion and date of filing

said motion does not appear in the record. Notice of Appeal from the judgment and from the order denying motion to amend was served and filed February 15, 1956. Jurisdiction, if any, of the United States Court of Appeals for the Ninth Circuit to review the case exists under Act of June 25, 1948, Ch. 646; 62 Stat. 929, 28 U.S.C.A. Section 1291; and 62 Stat. 930, 28 U.S.C.A. 1294; and Rule 73 of the Federal Rules of Civil Procedure. The record does not establish the jurisdiction of this Court to review the judgment of the District Court.

In the event it is determined that this Court does have jurisdiction, appellee presents its statement of the case and argument on the merits.

COUNTER-STATEMENT OF THE CASE

This is an interpleader action in which the plaintiff, Sun Life Assurance Company of Canada, a corporation, has deposited in the registry of the court the net proceeds of eight insurance policies on the life of Robert F. Weyen, who died on April 16, 1955. Several rival claimants to such proceeds have been impleaded as defendants (Tr. 3-15).

On September 22, 1953, the assured, Robert F. Weyen, a resident of Asotin County, Washington, secured a decree of divorce in the Superior Court of that county from his wife, Mary P. Weyen, who was awarded the custody of the two minor children of the parties, Daryl Weyen and Carolyn Weyen. The father was required to pay \$200 a month for their support during their minor-

ity, and the insurance policies in suit in accordance with the property settlement agreement entered into between the parties were awarded to the assured, Robert F. Weyen (Tr. 76).

On the next day following the entry of the divorce decree, Robert F. Weyen executed a trust agreement or declaration of trust in which he named his attorney, defendant E. J. Stanfill, as trustee, and stated that he had designated the trustee as beneficiary in ten life insurance policies. Seven of the policies are involved in the present action and three were issued by insurance companies other than the plaintiff. The policies constituted the corpus of the trust. The trust was to continue for a period of fifteen years and the beneficiaries were the two minor children of Robert F. Weyen. The trust instrument provided that in case of the death of Robert F. Weyen during the trust period, the trustee should collect the proceeds of the life insurance policies and use them for the education, maintenance, and support of the minor children.

The trust agreement contained the following provision:

“The donor specifically reserves the right during the term of this trust to pledge any of such policies as collateral or to exercise the loan rights as provided in said policies; and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the trustee named herein shall not be required to join in the application for said loans.” (Tr. 24-25, 77)

On the same day, September 23, 1953, Robert F. Weyen executed a Last Will and Testament in which he stated

that he had made no provisions for his minor children because

“I have heretofore provided for them through insurance policies on my life; however, should said policies lapse or become null and void, I hereby give, devise, and bequeath to my said children the sum of \$10,000, share and share alike.” (Tr. 27, 77)

On November 16, 1954, Robert F. Weyen executed an assignment to a trustee for benefit of his creditors. In that document he stated he was in financial difficulties and unable to pay his debts; that he assigned all his property, assets, and income to defendant Ralph B. Defenbach as trustee for his creditors. Certain real property and a number of items of personal property were particularly described in the assignment, including all but one of the life insurance policies which are the subject of the present action. (Tr. 33-55, 77-78)

The paragraph of the assignment in which the life insurance policies were listed recited that Robert F. Weyen, the assignor, had prepared the necessary documents to have Ralph E. Defenbach made his beneficiary for the benefit of creditors “joining in this assignment” in the event of his death, and the assignor undertook immediately to deliver the policies to Defenbach for forwarding to the home offices of the companies issuing said policies so that appropriate endorsements may be attached thereto showing Defenbach as beneficiary thereunder. (Tr. 40-41) The instrument further stated that this assignment shall constitute a mortgage upon all the property listed herein. (Tr. 44)

At the time of his death, the total amount of Weyen's debts covered by his assignment for the benefit of his creditors greatly exceeded the total net proceeds of his life insurance policies (Tr. 198). One insurance policy which was initially assigned to Stanfill as trustee was later assigned to Elfrieda May. This policy was awarded to Stanfill. This part of the judgment is not an issue.

SUMMARY OF ARGUMENT

The sole question involved in this case is the interpretation of the provision of the trust agreement quoted above, and whether the Stanfill agreement deprived the assured, Robert F. Weyen, of the right to change the beneficiary in view of the fact that specifically in the agreement itself he reserved the right to pledge the policies as collateral security for the payment of his debts.

Robert Weyen clearly intended by the quoted provision of the Stanfill trust agreement to retain the life insurance policies as a credit reserve to be used in connection with his business. In assigning the policies to appellee as trustee for the benefit of creditors, he clearly was using the policies in a manner intended by the reservation. An assignment or pledge of an insurance policy for the purpose of securing a debt clearly carries with it the right of the creditor to receive the proceeds of the policy upon the death of the assured to the extent of the debt outstanding, which in this case happens to be the full amount of the policies.

Appellants make no objection to the Findings of Fact I-V, most of the Finding of Fact No. VI, with the

exception of part of the next-to-last sentence; take no exception to Finding of Fact No. VII, the first sentence of Finding No. VIII, nor to Finding No. IX and X. (App. Br. 11 and 12). Under Rules of the United States Court of Appeals for the Ninth Circuit, Rule 18 Subsec. 1 (d), Appellants are required to specify as particularly as may be wherein Findings of Fact and conclusions of law are alleged to be erroneous.

The findings to which no exception is taken wholly support the judgment and the findings specified as error by appellants are fully supported by the record.

ARGUMENT

The question presented for determination is whether the defendant, E. J. Stanfill, as trustee in the trust agreement of September 23, 1953, or defendant Ralph B. Defenbach as trustee under the assignment for benefit of creditors of November 16, 1954, is entitled to the proceeds of the life insurance policies which are listed in and covered by both instruments.

Appellants admit that under the contract between the insurance company and Weyen, Weyen had reserved the right to assign or pledge every right conferred by the policy (App. Br. 16). The sole question is whether he had estopped himself from making an assignment which would in effect change the beneficiary of the policy by executing the Stanfill trust. It is difficult to understand appellant's position in view of the specific provision in the trust agreement (Paragraph 7 of the Trust Agreement) which reads as follows:

“The donor specifically reserves the right during the terms of this trust to pledge any of such policies as collateral, or to exercise the loan rights as provided in said policies; and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the trustee named herein shall not be required to join in the application for said loans.”

It would seem that there is little room for interpretation of such a provision; however, if there was any room for interpretation, the Washington Supreme Court has decided that question very definitely and decisively for the state of Washington, when it said:

“It seems to be the general rule that when the policy by its language recognizes the right of the assured to assign it, and when the assured may change the beneficiary, one to whom it has been assigned as security for a debt will be held to have a prior right to so much of the proceeds as may be required to discharge the debt secured (citing cases).

“It is a universally recognized rule that where the right to change the beneficiary is reserved to the assured, no beneficiary acquires a vested interest in the policy (citing cases).

“In these modern, complex times, the right of every man to use his accumulations to pay his debts, especially when he has pledged them to obtain liquid capital, ought not to be limited or abridged except only in those instances where by his own act he has barred his own right of control by creating an irrevocable vested interest in another or others. Life insurance during the life of the assured forms a reserve to be drawn upon in times of stress, and many have improved their fortunes and bettered the condition of their dependents by drawing liquid capital from that source to enable them to maintain or renew their business activities.”

Massachusetts Mutual Life Insurance Co. v. Bank of California, 187 Wash. 565, 570, 60 P. 2d 675

As the Honorable District Court stated in its opinion in this case :

“When he got into serious financial difficulties in November of 1954, Weyen took advantage of the reservation he had made in his declaration of trust and, in effect, pledged the life insurance policies as collateral security for the payment of his debts. It was not necessary for him to change the beneficiary in order to accomplish that purpose. Indeed, if he had gone through all the forms of changing the beneficiary, or had undertaken to make a complete and unconditional assignment of his life insurance, it would have been regarded in legal affect as an assignment or pledging for security, as that plainly appeared to be the intention of the parties. There can be no doubt from consideration of the entire instrument of assignment for creditors that Weyen did not intend to make defendant Defenbach, his trustee, the unconditional beneficiary of his life insurance or to convey unconditionally to such trustee all of his property, but intended rather to pledge his assets, including his life insurance, as security for the payment of his debts.” (Tr. 70-71)

Appellants in their brief seem to recognize that Weyen did retain the right to pledge the insurance policies as collateral, but they attempt to make two reservations: (1) That this reservation allowed Weyen to pledge the insurance policies only to the extent that they were generally in the market considered liquid capital or to the extent of their cash surrender value. (2) That the word “or” between the clauses “to pledge any of such policies as collateral” and the clause “to exercise the loan rights as provided in said policies,” should be

construed as creating an alternative right so that once the policies had been used to secure a loan from the insurance company, they could not thereafter be pledged for any further debts.

The first argument is entirely unsound because it attempts to write into the agreement something that is not there. Appellants state on Page 14 of their brief that "Loans on policies as a practical matter are limited to cash surrender value." As a matter of fact, it will be found that generally speaking, loans are limited to the cash surrender value less one year's premiums. In effect, appellants are asking the court to write into the reservation in Paragraph 7 of the trust agreement the words "to the extent of their cash surrender value or, in the alternative, to the extent of their loan value." The law is well settled that the courts will not make a new contract or rewrite a contract which the parties did not make. As stated by the Supreme Court of Washington:

"Courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves. *Chaffee v. Chaffe*, 19 Wash. 2d 607, 145 P. 2d 244."

Clements vs. Olsen, 46 Wash. 2d 445, 448, 282 P. 2d 266.

Chaffee v. Chaffee, 19 Wash. 2d 607, 145 P. 2d 244, also states the general rule, at page 625, quoting from 12 Am. Jur. 749, Contracts, Sec. 228, as follows:

"Interpretation of an agreement does not include its modification or the creation of a new and different one. A court is not at liberty to revise an agreement while professing to construe it, nor does it

have the right to make a contract for the parties—that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves, or the imposition upon one party to a contract of an obligation not assumed. Courts cannot make for the parties better agreements than they themselves have been satisfied to make, or rewrite contracts because they operate harshly or inequitably as to one of the parties. If the parties to a contract adopt a provision which contravenes no principle of public policy and contains no element of ambiguity, the courts have no right, by a process of interpretation, to relieve one of them from disadvantageous terms which he has actually made.”

It is also basic law that in the construction of contracts, the intention of the parties to the agreement must control. When the intent of the parties is clearly evident, as in this case, the courts have nothing to construe and must be governed by the intentions of the parties as expressed in the written instrument.

Silen v. Silen, 44 Wash. 2d 884, 271 P. 2d 674; *Thomle v. Soundview Pulp Co.*, 181 Wash. 1, 42 P. 2d 19; *E. H. Stanton Co. v. Rochester Agency*, 206 F. 978; *Pitcairn v. American Co.*, 101 F. 2d 929.

It is also a basic rule that the first and best resort in the construction of contracts is to put oneself in the place of the parties at the time the contract is executed, to look at it in prospect rather than retrospect.

Long-Bell Lumber Co. v. National Bank of Commerce, 35 Wash. 2d 522, 214 P. 2d 183.

It seems clear that when Robert Weyen entered into the Stanfill trust agreement, he intended to retain con-

trol over the insurance policies to the extent that it was necessary to use them in securing credit; that he had in mind, in view of the nature of his business as a large-scale logging contractor, which is stated by the District Court as

“Not generally regarded as one of the more stable forms of business activity,” (Tr. 70)

that he obviously wished to reserve his life insurance as a useful credit resource.

Surely appellants cannot mean to contend that upon Weyen's death the pledge that he may have made of the insurance policies would become void and that the pledgee would lose his security and lose the entire amount of his loan. On the contrary, they have tacitly admitted that the insurance company had the right to withhold part of the proceeds of the policies to repay the loans to themselves, and tacitly admit that had Weyen pledged the policies to a bank or other lending institution to the amount of the cash surrender value or whatever amount he could secure from the bank on such collateral, such loan would have priority over the Stanfill trust as beneficiary under the designation at the time the Stanfill trust was executed. The right to pledge policies without the right of the pledgee to recover upon the death of the pledgor in the amount of any loan extended to him would, of course, be valueless and it could not be assumed that Weyen intended to reserve to himself a right which would be of no value.

Appellants make much of the fact that Weyen executed a will at the same time that he executed the Stan-

fill trust. The provisions of the will appear to weaken their contention rather than to strengthen it. As a matter of fact, the will specifically contemplates that the insurance policies might lapse and become null and void for any number of reasons. (Tr. 27, 77). The so-called insurance trust is not a funded trust of any kind; it could lapse or fail because of the failure to pay premiums; and likewise it could lapse or fail because the insurance policies might be used as collateral security to secure a debt, which in fact happened.

The inconsistency of appellant's position in this case can be further demonstrated by assuming that Weyen may have pledged the insurance policies along with a considerable amount of machinery for a single debt, without specific reference to the amount which each piece of property or each insurance policy was pledged. If we assume for one reason or another the machinery depreciated in value considerably and upon Weyen's death the machinery plus the cash surrender value of the policies was not sufficient to pay off the debt, would it be contended that the rights of the lender in this case would be restricted to the cash surrender value of the policies? Such an interpretation runs far afield from the province of interpretation and far into the field of writing a new contract for the parties.

Appellants' contention that the word "or" in the reservation in Paragraph 7 of the trust agreement left Weyen only an alternative is also unsound (Appellants' Brief 23). Appellants cite the 1956 supplement to *Words and Phrases*. There are slightly over two pages

of cases cited where “or” is construed as being the alternative, and there are over three pages of cases where “or” is construed as “and.”

30 Words and Phrases 1956 Supp. P. 16-22

There are also many pages in the main volume of *30 Words and Phrases* citing cases construing the word as both “and” and as an alternative.

30 Words and Phrases P. 69, et seq.

It would neither be possible nor profitable to analyze each of these cases.

There is one thing all the cases have in common: That is, that the word “or” is construed as “and” or as indicating an alternative, whichever appears to carry into effect the intention of the parties. Under the circumstances involved in the instant case, it seems to be completely unreasonable to assume that Weyen intended to restrict himself in the manner suggested by appellants.

In addition, it should be pointed out that appellants’ specifications of error, as compared with the arguments made in their brief, create a very confusing situation. No exception was taken to the part of finding of fact No. 6 which stated that:

“Prior to November 16, 1954, Robert F. Weyen had become involved in financial difficulties, was unable to pay his debts, and that on November 16, 1954, he executed an assignment to Ralph B. Defenbach as trustee for the benefit of his creditors. In that document he assigned all his property, assets,

and income to Ralph B. Defenbach as trustee for his creditors. Certain real property and a number of items of personal property were particularly described in the assignment, and said assignment included all by (sic) one of the life insurance policies which are the subject of the present action.

“In this manner said policies were pledged to defendant Ralph B. Defenbach as trustee for the creditors of Robert F. Weyen.”

Also, no exception was taken to Finding No. VII, which reads as follows:

“By its terms the Stanfill trust specifically reserved the right to the donor, Robert F. Weyen, to exercise the loan rights as provided in the policies of insurance and ‘to pledge any of such policies as collateral’; that this trust agreement was drafted by a lawyer and the right to pledge as collateral was reserved to the donor by means of putting up the policies as security for a debt additional to the personal obligations of the debtor. The right reserved to pledge the insurance policies as collateral applied to security for the payment of debts, whether they be antecedent or newly created.”

Part of Paragraph VIII, to which no exception was taken, reads as follows:

“When Robert F. Weyen got into serious financial difficulties in November of 1954, he took advantage of the reservation he had made in his declaration of trust and did pledge the life insurance policies as collateral security for the payment of his debts.” (Tr. 77-79) (App. Br. 11-12)

Since no exception was taken to these findings of fact in the specifications of error, objections to these findings are waived.

Rule 18—1(d)—Rule of Court of Appeals for Ninth Circuit

Gelberg v. Richardson, 82 F. 2d 314

Gripton v. Richardson, 82 F. 2d 313

Berry v. Earling, 82 F. 2d 317

Barnett v. U. S., 82 F. 2d 765

Hultman v. Tevis, 82 F. 2d 940

Reuter v. McCook, 92 F. 2d 267

Since the Stanfill trust specifically reserved the right to Weyen to exercise the loan rights and to pledge any of such policies as collateral, and the right reserved to pledge the insurance policies as collateral applied to security for the payment of debts whether they be antecedent or newly created, and since Robert Weyen did pledge the life insurance policies as collateral security for the payment of his debts, and since it is definitely settled under the law of Washington that one to whom an insurance policy has been assigned as security for a debt will be held to have a prior right to so much of the proceeds as may be required to discharge the debt secured (*Mass, etc. Co. v. Bank of California*, 187 Wash. 565, 60 P. 2d 675); the conclusions of law and the judgment could not do otherwise than award the proceeds of the policies to the appellee, to whom these policies had been pledged.

The Specification of Error No. 1 quotes:

“the necessary documents were prepared and the assignor delivered the policies to Defenbach for forwarding to the home office of the companies issuing said policies so that appropriate endorsements might be attached thereto showing Defenbach as beneficiary.” (Appellants’ Br. 11)

Appellants make little or no reference to specification of error No. 1 with the exception that on page 17 of their brief, they state that Weyen used the company form in naming Stanfill as trustee but did not do so as to Defenbach. Such a discrepancy would be immaterial, inasmuch as the law is well settled that where an assured has the right to assign the policy, he may do so without complying with the provisions of the policy prescribing the manner of changing the beneficiary. Upon the death of the assured the assignee is entitled to the proceeds of the policy to the extent of his interests as against the beneficiary.

Mass., etc. Co. v. Bank of California, 187 Wash. 565, 60 P. 2d 675;
135 A.L.R. 1040 (n)

Specification of Error No. 2 is similar and is answered by the same authorities.

Specifications of Error No. 3, 4, 5, 6, and 7 relate merely to the conclusions to be drawn from the facts that have been previously answered. (Appellants' Br. 11-12)

Specification of Error No. 8, reads as follows:

“The Court erred in refusing to allow Elfrieda May and E. J. Stanfill as Trustee the \$3,000 paid to Weyen's creditors to enable them to obtain the Defenbach agreement.” (App. Br. 12)

Appellants treat this specification in a very offhand manner and cite one decision of an intermediate Tennessee court. This case is not in point, since it involves

a constructive trust imposed on proceeds of a policy purchased with misappropriated funds. Testimony with relation to this claim is very brief and very general, and to the effect that Elfrieda May put up something in the neighborhood of \$3,000, which was apparently used to make payments due Mrs. Weyen, Weyen's divorced wife, under the divorce decree.

What Mrs. May's position might be in the assignment proceeding and what her priorities might be are matters which could be determined only in connection with the settlement of the Defenbach trusteeship and are matters which involve the remaining creditors. There is no authority or reason for settling such a claim in this proceeding.

See *Spring and Sons v. South Carolina Insurance Co.*, 8 Wheat. (U. S.) 268, 5 L. Ed. 614.

CONCLUSION

Both at law and in equity the creditors of Robert Weyen are entitled to the proceeds of the insurance policies in dispute. Weyen clearly and uncontrovertably retained the right to use these insurance policies for the purpose of procuring credit or assisting him in his business. This he did. His creditors were in a position at the time of the assignment for the benefit of creditors to put him out of business, to bring suits against him and secure judgment, to throw him into bankruptcy. Instead, they were willing to accept his pledge of all his assets and the management of his affairs by the assignee

for the benefit of creditors. He thus secured a stay and an opportunity to extricate himself from his difficulties, and the creditors lost their opportunity to realize on whatever assets he had at that time. Those assets were subsequently lost; and if the proceeds of the insurance policies are also lost to them, they will have given up their rights and secured nothing in return.

Assignments for the benefit of creditors are construed liberally and favorably in favor of the creditors and assignee for benefit of creditors.

4 Am. Jur. 339, Assignments for Benefit of Creditors, Sec. 2.

It is true that the children are also entitled to consideration. However, the courts are not justified in determining this matter on the basis of which of the interested parties is the most deserving of consideration. There seems to have been no doubt in anyone's mind prior to the death of Robert Weyen that he had retained the right to pledge these policies to the assignee for benefit of creditors as part of his assets.

We respectfully submit that there is no justification for following the suggestion of appellants that the court write an additional clause into the Stanfill trust restricting Weyen's right to pledge the insurance policies up to the cash surrender value and no further.

Respectfully submitted,

PAINE, LOWE, COFFIN AND HERMAN
HAROLD W. COFFIN
ALAN P. O'KELLY
Attorneys for Appellee

No. 15084

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. F. SHUCK CONSTRUCTION CO., INC.,
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., THE SEATTLE CONSTRUCTION COUNCIL and HOD CARRIERS' BUILDING AND COMMON LABORERS' UNION, LOCAL No. 242, AFL,
Respondents.

and

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., and its affiliate SEATTLE CONSTRUCTION COUNCIL,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Transcript of Record

Petition for Enforcement and Petition for Review of Order
of the National Labor Relations Board

FILE

JUL -6 1956

No. 15084

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. F. SHUCK CONSTRUCTION CO., INC.,
THE ASSOCIATED GENERAL CONTRAC-
TORS OF AMERICA, SEATTLE CHAP-
TER, INC., THE SEATTLE CONSTRUC-
TION COUNCIL and HOD CARRIERS'
BUILDING AND COMMON LABORERS'
UNION, LOCAL No. 242, AFL,
Respondents.

and

ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, SEATTLE CHAPTER, INC.,
and its affiliate SEATTLE CONSTRUCTION
COUNCIL, Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
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Transcript of Record

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GENERAL COUNSEL'S EXHIBIT No. 1-H

United States of America

Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-851

In the Matter of E. F. SHUCK CONSTRUCTION CO., INC., and THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., and THE SEATTLE CONSTRUCTION COUNCIL, and RICHARD B. KIEBURTZ, an Individual.

Case No. 19-CB-261

In the Matter of HOD CARRIERS', BUILDING AND COMMON LABORERS' UNION LOCAL No. 242, AFL, and RICHARD B. KIEBURTZ, an Individual.

CONSOLIDATED COMPLAINT

It having been charged by Richard B. Kieburtz, an individual, that the Respondents, E. F. Shuck Construction Company, Inc., The Associated General Contractors of America, Seattle Chapter, Inc., The Seattle Construction Council, and Hod Carriers', Building and Common Laborers' Local No. 242, AFL, have engaged in and are now engaging in certain unfair labor practices affecting commerce as set forth in the Labor-Management Relations Act of 1947, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board, on

behalf of the Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Consolidated Complaint and alleges as follows:

I.

E. F. Shuck Construction Company, Inc., herein called the Company, is a Washington corporation engaged in general construction work, with its principal offices in Seattle, Washington.

II.

The Company is a member of The Associated General Contractors of America, Seattle Chapter, Inc., herein called AGC Seattle Chapter, whose other members are engaged in building, heavy, and highway construction work.

III.

The AGC Seattle Chapter has other affiliate members engaged in specialty construction work, who are associated under the name of "Seattle Construction Council, Affiliate Members of The Associated General Contractors of America, Seattle Chapter, Inc.," hereafter called the Construction Council.

IV.

The Company annually engages in construction work valued in excess of \$50,000 for employers who operate facilities of interstate and international commerce, and for other employers whose opera-

tions produce goods and services for out-of-state deliveries valued in excess of \$25,000 annually.

V.

In addition to the Company, the enterprises that are members and affiliate members of AGC Seattle Chapter and of the Construction Council, who are associated for purposes, *inter alia*, of negotiating collective bargaining agreements with trade unions, governing the labor-management relations of all members, conduct construction work which, to an extent exceeding \$50,000 annually, is performed for employers who operate facilities of interstate and international commerce, and for other employers who produce goods and services for out-of-state deliveries valued in excess of \$25,000 annually.

VI.

The operations of the Company affect commerce within the meaning of Section 2 (6) and (7) of the Act.

VII.

The labor-management relations practices of AGC Seattle Chapter and of the Construction Council, both acting as agents of the Company, affect commerce within the meaning of Section 2 (6) and (7) of the Act.

VIII.

Hod Carriers', Building and Common Laborers' Union Local No. 242, AFL, hereafter called Local 242, at all times hereafter mentioned has been and is a labor organization within the meaning of Section 2 (5) of the Act.

IX.

The AGC Seattle Chapter and the Construction Council, acting in behalf of the members of each organization, including the Company, on November 3, 1950, entered into a collective bargaining agreement with Local 242, which agreement is presently being given effect by the parties to it and, inter alia, provides

(a) Members of the said employer organizations shall "employ none other than members" of Local 242 in the type of work its members are employed in, and

(b) Local 242 undertakes to "require all employers, whether members * * * or not" of the said employer organizations, within the territorial limits of the jurisdiction of Local 242, to impose the condition of employment required under (a) above.

X.

The Company gave effect to the agreement described in paragraph IX, and on July 31, 1953, it discharged Richard B. Kiebertz, a common laborer employed by the Company, because of his nonmembership in Local 242, since which date it has refused to reinstate him.

XI.

Local 242, on or about July 31, 1953, requested the Company to take the action described in paragraph X.

XII.

By the action and conduct described in paragraphs IX and X, acting on the request described in

paragraph XI, the Company, the AGC Seattle Chapter, and the Construction Council has discriminated against employees, and particularly against employee Kiebertz, to encourage membership in Local 242, in violation of Section 8 (a) (3) of the Act, and Local 242 did attempt to cause and did cause such discrimination in violation of Section 8 (b) (2) of the Act.

XIII.

The action of the Company, the AGC Seattle Chapter, and the Construction Council described in paragraphs IX and X, interfered with, restrained and coerced employees in the exercise of their rights under Section 7 of the Act thereby violating Section 8 (a) (1) of the Act; and the action of Local 242 described in paragraphs IX and XI coerced and restrained employees in the exercise of their rights under Section 7 of the Act thereby violating Section 8 (b) (1) (A) of the Act.

XIV.

The action and conduct of all Respondents, as set forth in paragraphs IX through XI, inclusive, occurring in connection with the operations of the Employers described in paragraphs I through VII, inclusive, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and with foreign countries, and have led to and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Sections 8 (a) (1) and (3) and Sections 8 (b) (1) (A) and (2) and of Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board issues this Consolidated Complaint against the Respondents, E. F. Shuck Construction Company, Inc., The Associated General Contractors of America, Seattle Chapter, Inc., and The Seattle Construction Council, Affiliate Members of The Associated General Contractors of America, Seattle Chapter, Inc., and Hod Carriers', Building and Common Laborers' Union Local No. 242, AFL.

Dated at Seattle, Washington, this 16th day of October, 1953.

[Seal] /s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
Region 19, 407 U. S. Court House, Seattle 4,
Washington.

Affidavit of Service and Postal Return Receipts
Attached.

GENERAL COUNSEL'S EXHIBIT No. 1-J

[Title of Board and Cause.]

ANSWER OF ASSOCIATED GENERAL CON-
TRACTORS OF AMERICA, SEATTLE
CHAPTER, INC., and SEATTLE CON-
STRUCTION COUNCIL

Associated General Contractors of America, Seat-
tle Chapter, Inc., and its affiliate, Seattle Construc-

tion Council, answer the Complaint herein as follows:

I.

The allegations of paragraphs II, III, V, VIII and IX of the Complaint are admitted.

II.

The allegations of paragraphs VII, XII, XIII and XIV of the Complaint are denied.

III.

These answering defendants do not have sufficient knowledge or information upon which to base a belief as to the truth or falsity of the allegations of the remaining paragraphs of the Complaint, and, therefore, deny the same.

Wherefore, these defendants pray that the Complaint be dismissed as to them.

/s/ LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Associated General Contractors of
America, Seattle Chapter, Inc., and Seattle
Construction Council.

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 1-K

[Title of Board and Cause.]

ANSWER OF E. F. SHUCK CONSTRUCTION
CO., INC.

E. F. Shuck Construction Co., Inc., answers the Complaint of the National Labor Relations Board as follows:

I.

Paragraphs I and II are admitted.

II.

Paragraph III is denied for want of knowledge.

III.

Paragraph IV is denied except that this answering defendant admits "The Company annually engages in construction work valued in excess of \$50,000".

IV.

Paragraphs V, VI, and VII are denied for want of knowledge.

V.

Paragraph VIII is admitted.

VI.

Paragraph IX is denied for want of knowledge.

VII.

Paragraph X is denied.

VIII.

Paragraphs XI, XII, XIII and XIV are denied.

This answering party, responding further and by way of affirmative defense, alleges:

That prior to July 29, 1953, one Richard B. Kieburtz, representing himself to be a student and seeking work, made application to this answering defendant for employment. That his name and telephone number were kept at the office of this answering defendant, and on or about July 28, 1953, this answering defendant was in need of additional help by reason of the fact that it was about to pour a batch of cement, and so notified the office that additional help would be needed for a few days to pour this cement. That the said Richard B. Kieburtz was called and reported to this answering defendant's Mercer Island School District job on Mercer Island, and was put to work on July 29, 1953, as a common laborer by the Superintendent of this answering defendant. He was employed as a common laborer for work on the said job site on a day to day basis, and worked July 29, July 30, and July 31, 1953, being Wednesday, Thursday and Friday. By that time the temporary necessity for additional common labor had ended, as the batch of cement had been poured. By reason of the fact that the young man either was unwilling to perform the work or was not adapted to the work, he was not considered to be a desirable employee, and his services have not been sought since July 31, 1953. That he remained with this answering defendant until

the temporary need was ended, and that neither his employment nor the fact that his services have not been sought since July 31, 1953, have any bearing whatsoever on whether he did or did not have a membership in any Union or Labor organization.

Wherefore, this answering defendant prays that the Complaint be dismissed as to this answering defendant.

[Seal] E. F. SHUCK CONSTRUCTION
 CO., INC.

/s/ By E. F. SHUCK JR.,
 Vice President.

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 1-L

[Title of Board and Cause.]

ANSWER OF HOD CARRIERS' BUILDING
AND COMMON LABORERS' UNION LO-
CAL No. 242, AFL

Hod Carriers' Building and Common Laborers' Union Local No. 242, AFL answers the Complaint herein as follows:

I.

The allegations of paragraphs II, III, V, VIII and IX of the Complaint are admitted.

II.

The allegations of paragraphs VII, X, XII, XIII and XIV of the Complaint are denied.

III.

This answering defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or falsity of the allegations of the remaining paragraphs of the Complaint, and therefore denies the same.

Wherefore, this defendant prays that the Complaint be dismissed as to it.

/s/ ROY E. JACKSON,
Attorney for Hod Carriers' Building and Common
Laborers' Union Local No. 242, AFL.

Duly Verified.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND
RECOMMENDED ORDER

Melton R. Boyd, Esq., for the General Counsel.
Carl E. Croson, Esq., and Arthur G. Quigley, Esq.,
of Seattle, Wash., for Shuck. Lyle L. Iversen, Esq.,
for the General Contractors and the Construction
Council. Roy E. Jackson, Esq., for the Union.

Before: Wallace E. Royster, Trial Examiner.

Statement of the Case

Upon charges filed by Richard B. Kieburtz, an individual, against E. F. Shuck Construction Co., Inc., herein called Shuck; The Associated General Con-

tractors of America, Seattle Chapter, Inc., herein called the General Contractors; The Seattle Construction Council, herein called the Construction Council; and Hod Carriers', Building and Common Laborers' Union, Local No. 242, AFL, herein called the Union, the General Counsel for the National Labor Relations Board issued his complaint against each of the above-named Respondents alleging certain violations of the National Labor Relations Act, as amended, 61 Stat. 136.

The core of the complaint is that the Construction Council, a division of the General Contractors, in behalf of Shuck and other employers, entered into and gave effect to a collective bargaining agreement with the Union, contemplating that only members of the Union would be hired for employment in any work performed by members of the General Contractors and the Construction Council. It is alleged that Kieburtz, after obtaining employment with Shuck, was discharged because he was not a member of the Union.

Pursuant to notice a hearing was held before the undersigned Trial Examiner in Seattle, Washington, on October 29 and 30, 1953. All parties were represented, were permitted to examine and cross-examine witnesses and to participate fully in the hearing. Briefs have been received from the General Counsel, the Union, the General Contractors, and Shuck.

Upon consideration of the record and the briefs, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondents

Shuck, a Washington corporation engaged in general construction work with its principal offices in Seattle, annually engages in construction work valued in excess of \$50,000 for employers who operate facilities of interstate and national commerce and for other employers whose operations produce goods and services for out-of-State delivery valued in excess of \$25,000 annually.

The General Contractors and the Construction Council have as members employers engaged in the Seattle area in the construction of buildings and highways. The General Contractors and the Construction Council negotiate collective bargaining agreements with trade unions for their members, some of whom engage in construction work to an extent exceeding \$50,000 annually for employers who operate facilities of interstate and national commerce and for other employers who produce goods and services for out-of-State delivery valued in excess of \$25,000 annually.

The Union is a labor organization admitting to membership employees of Shuck and of other members of the General Contractors and the Construction Council.

II. The unfair labor practices

On November 3, 1950, the General Contractors and the Construction Council in behalf of their members, including Shuck, entered into a collective bargaining agreement with the Union which was

still in effect at the time of the hearing and which provided that none of the employer members would employ other than members of the Union. The practice under this contract in respect to Shuck and the Union was for the former to advise the Union of any need for laborers or hod carriers, who then would be dispatched from the Union hall to the construction site. In June 1953 Shuck began work looking toward the construction of several school buildings in or near Seattle.

Richard Kieburtz, age 19, a student at the University of Washington, in July 1953 was seeking temporary employment. Learning that his opportunity to find work would be greater if he was a member of the Union, Kieburtz went to the Union's office where he spoke to Robert Buchanan, a business agent. Buchanan told him, Kieburtz testified credibly, that if he found a job to have the employer call the Union in connection with getting a permit for Kieburtz to work on a temporary basis. On the same day Kieburtz applied to Everett Sayler, Shuck's job superintendent on the school construction, for work. Sayler suggested that Kieburtz leave his name in Shuck's office and Kieburtz did so. On July 28 Kieburtz was informed by telephone that Shuck had a job for him to begin the next morning. On July 29, a Wednesday, Kieburtz reported to work on the school construction job. Sayler that morning, according to Kieburtz, said, "We'll have to see how this union business works out later." Kieburtz was put to work with another laborer, Sam Swatack, under the supervision of Foreman Chester Tucker.

About 10:30 in the morning of Friday, July 31, Kieburtz, he testified, saw Elmer Wood, another of the Union's business agents, in conversation with Superintendent Sayler, and noticed one of them pointing in his direction. Wood then spoke to Foreman Tucker and coming to Kieburtz asked if Kieburtz had a "card or anything." Kieburtz answered that he would like to join the Union but had no card. Wood answered that Kieburtz could not become a Union member. Tucker came over at this point, according to Kieburtz, and said that Kieburtz would be permitted to work out the day. Kieburtz remarked to Wood that he thought he was entitled to join the Union as long as he had a job within its jurisdiction. Wood answered that there were too many members unemployed and that new ones would not be taken in. At the close of the work day Foreman Tucker gave Kieburtz two checks, one for the work on Wednesday, the end of a payroll period, and the other for Thursday and Friday. Tucker remarked, "Sorry, but that is the way it is." Kieburtz went to Superintendent Sayler who said, in the words of Kieburtz, "I don't know just what to tell you, kid. We have to go along with the Union on this or they can make trouble for us." Sayler said that Shuck had an agreement with the Union to hire through the Union's hall. Kieburtz protested that he thought the Taft-Hartley Act made such an arrangement unlawful. Sayler answered that the contract with the Union must be honored. Kieburtz on the following Monday filed the charges giving rise to this proceeding.

Robert Buchanan testified that laborers were dispatched from the Union's hall to Shuck and other employers upon request and that members of the Union were invariably dispatched before anyone without that qualification. In respect to students, Buchanan testified it was the Union's practice to give permits upon the application of an employer enabling a student to work throughout the vacation period and if such an employee was retained for more than 10 days, to require him to pay a \$5 permit fee. Such permits were never given directly to the student on his application. Buchanan denied that he or the Union was in any respect concerned in Kieburtz' discharge.

Superintendent Sayler testified that Kieburtz applied to him for work, that Sayler instructed him to leave his name at the office, and that about a week or so later Kieburtz appeared on the job. According to Sayler he had need on July 29 for some additional laborer help because concrete footings were about to be poured on some of the school buildings. Sayler testified that Kieburtz was called to work through error, that he had in mind another applicant. Upon Kieburtz' first application, according to Sayler, the latter asked him if he was a member of the Union. Kieburtz answered that he was not but that he would handle that matter himself. On the morning of July 29, according to Sayler, there was no mention of Union membership between him and Kieburtz. During the next 3 days Sayler observed, he testified, that Kieburtz was not cleaning out the bottom of the footing forms properly and that he was a

slow worker. Still according to Sayler, Foreman Tucker complained that Kieburtz did not follow instruction. Sayler observed, he testified, that Kieburtz was not keeping pace with the other laborers on the job. Before noon on Thursday, July 30, Sayler concluded that Kieburtz would not do and determined to discharge him. Sayler denied that Business Agent Woods spoke to him concerning Kieburtz. Foreman Tucker testified that Kieburtz was "satisfactory," but would do things in his own way rather than follow literal instruction. Tucker testified that he told Superintendent Sayler he did not think Kieburtz would be a satisfactory employee. Tucker testified that Business Agent Woods, as far as his knowledge extended, had nothing to do with Kieburtz' discharge, but did recall that he heard Woods tell Kieburtz to get himself straightened out with the Union.

Sam Swatack, a member of the Union who worked closely with Kieburtz, testified that Kieburtz appeared to be inexperienced and for that reason, Swatack did not like to work with him.

E. F. Shuck, Sr., testified that he observed Kieburtz at work on July 29 and indicated to Superintendent Sayler that Kieburtz was not satisfactory. The next day, according to Shuck, he told Sayler to get rid of Kieburtz as soon as it was convenient. About 8:30 on the morning of July 31, according to Shuck, he signed the final check for Kieburtz and later that morning delivered it to the job.

Eugene Shuck, Jr., testified that his company had employed students during the summer months on other occasions and sought permits from the Union

for those who proved their competency as workers. No such permit was requested for Kieburtz by his employer. The job of laborer in construction work appears to be one requiring no particular training although, as in almost any field, I assume that experience is of some value. Kieburtz in previous summers had worked in such employment and was not entirely unfamiliar with construction work from the standpoint of a laborer. His appearance is that of a young man of good physique and intelligence. Superintendent Sayler must have concluded at the time of his first interview with Kieburtz that the latter probably would make an acceptable worker for it seems unlikely that otherwise, he would have suggested that Kieburtz leave his name and telephone number at the employment office. But within a day and a half after Kieburtz reported for work Sayler became convinced, he testified, that Kieburtz was not earning his way. There is nothing inherently improbable about such a development. But what puzzles is the retention of Kieburtz on the job for more than a day after Sayler had reached that conclusion. E. F. Shuck, Sr., testified that he had instructed Sayler to release Kieburtz as soon as convenient. Although Sayler did not testify that Shuck had so instructed him, no reason is suggested for retaining Kieburtz after the finish of work on July 30. Kieburtz' immediate foreman, Tucker, characterized Kieburtz' work as satisfactory, with the qualification that he did not follow instruction. Kieburtz testified that at no time during the 3 days that he worked was his work in any respect criticized or was

he at any time told that he had failed in any fashion to follow an instruction.

The contract running between the General Contractors and the Union covering the operations of Shuck contains a patently unlawful provision in respect to union security. An employer in an operation in commerce or affecting commerce may not lawfully agree to prefer union members for hire, and a union may not lawfully contract with such an employer to that effect. It is argued that Section 11 of that contract, reading

If any section, subsection, clause, sentence or phrase of this agreement is, for any reason, held to be repugnant to or in conflict with or in violation of the Labor-Management Relations Act of 1947, otherwise known as the Taft-Hartley Labor Act, being 29 U.S.C., et seq., such repugnancy, conflict or violation shall not affect the validity of the remaining portions of this agreement, and all portions thereof not repugnant to or in conflict with or in violation of said Labor-Management Relations Act of 1947 shall be enforced and abided by as herein written.

has the effect of removing the offending section and permitting the contract otherwise to stand. I do not so interpret it. The section concerning employment imposes unlawful conditions and Section 11 does no more than provide that if such illegality is adjudicated the remaining portions of the agreement will continue in effect. By giving effect to a contract preferring members of the Union for hiring and reten-

tion of employment, the General Contractors, the Construction Council, and Shuck accomplish such an interference, restraint, and coercion of employees in respect to rights guaranteed in Section 7 of the Act as amounts to a violation of Section 8 (a) (1) of the Act.

By such conditioning of employment and retention of employment upon membership in or approval by the Union, those three Respondents encouraged membership in the Union and thereby violated Section 8 (a) (3) of the Act.

By giving effect to this offending paragraph in the contract the Union restrained and coerced employees in respect to rights guaranteed in Section 7 of the Act, in violation of Section 8 (b) (1) (A) of the Act.

The contract and the hiring and referral practices under it, constitute a successful attempt by the Union to cause the employer signatories to discriminate against employees, in violation of Section 8 (a) (3) of the Act, and the Union thereby has violated and is violating Section 8 (b) (2) of the Act.

Against the setting of the contract provisions and the hiring practices, the discharge of Kieburtz must be viewed. Kieburtz was in my opinion an honest and truthful witness in respect to the developments concerning his employment. I recognize of course that his appraisal of his work performance may be more favorable to him than a disinterested observer would make. But the complaints voiced by Sayler, Tucker, and E. F. Shuck, Sr., are trivial. I do not

credit the testimony that Kieburtz was an unwilling worker. The criticisms contained in the testimony, if they have validity at all, appear to relate to conduct which quickly could have been corrected by a word from any of those in a supervisory capacity. Kieburtz' testimony already related concerning his conversation with Sayler after the receipt of his final check on the evening of July 31, stands uncontradicted. Sayler testified that he recalled no conversation with Kieburtz at the time. I credit Kieburtz' relation of what occurred then.

On the basis of all the evidence, upon a conviction derived from the testimony that Kieburtz was a reasonably competent worker and that Shuck had no serious ground for complaint in respect to his work performance, I am convinced that his discharge on July 31 was motivated by the conviction of Respondent Shuck that his continued employment might lead to some difficulty with the Union. Sayler, as quoted by Kieburtz, put it succinctly and truthfully when he said that the contract with the Union must be honored. The reason for the discharge was thus admitted.

It will be recalled that Foreman Tucker testified to a conversation between Kieburtz and Business Agent Woods on the morning of July 31 to the effect that Kieburtz himself make some arrangement with the Union. It is urged by the General Counsel that the evidence is sufficient to establish that a demand was made by the Union upon Shuck that Kieburtz be discharged. The circumstances of the visit of the

Union agent to the job, his conversations with Saylor, Tucker, and Kieburtz, and the discharge of Kieburtz at the close of that day are suggestive of such a happening. But I do not find that any such demand was made. I am convinced, as I have found, that the discharge of Kieburtz occurred because he was not a member of the Union and because he did not have the permission of the Union to remain in his employment. As the Union was a party to an agreement with Shuck and other employers requiring Union membership or approval for hire and retention of employment, it is of no concern here whether in fact any demand was made specifically requiring the discharge of Kieburtz. The fact is that by contract the Union and Shuck and other employers had agreed that men without Union membership or approval would not be hired or retained in employment. Kieburtz was one such and his discharge followed. I find that by the discharge of Kieburtz the Respondent Shuck discriminated in regard to his hire and tenure of employment, thus encouraging membership in the Union and thus violating Section 8 (a) (3) of the Act. Because this discrimination stemmed from a contractual relationship between Shuck and the Union and because the contract was the product of negotiation between the General Contractors and the Construction Council on the one hand and the Union on the other, I find that the General Contractors and the Construction Council to the same extent as Shuck discriminated in regard to the hire and tenure of employment of Kieburtz — thus encouraging membership in the

Union and thereby violating Section 8 (a) (3) of the Act.¹

By giving effect to the offending clause in the contract the Union caused Shuck to discriminate in regard to the hire and tenure of employment, in violation of Section 8 (a) (3) of the Act, and thereby violated Section 8 (b) (2) of the Act.

By the discharge of Kieburtz the Respondent Shuck, the General Contractors, and the Construction Council interfered with, restrained, and coerced an employee in the exercise of rights guaranteed in Section 7 of the Act and thereby violated Section 8 (a) (1) of the Act.

By contracting so as to make objectionable under the contract the continued employment of Kieburtz, the Union restrained and coerced an employee in the exercise of rights guaranteed in Section 7 of the Act and thereby violated Section 8 (b) (1) (A) of the Act.

The argument that the union security clause of the contract finds protection in Section 102 of the Act is untenable. The contract under which the discharge was made was executed in November 1950. It may be true, as asserted, that the union security provision in that contract was no more than a reiteration of the same clause in contracts which had been effective between the parties for years before the passage of the Labor Management Relations Act, 1947, but the fact is that any such agreement was renewed or extended in November 1950 and what-

¹ George D. Auchter Company, 102 NLRB 881.

ever protection Section 102 may have afforded the parties prior to that date was then and thereby lost.

III. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section II above, occurring in connection with the operations of Respondent Shuck described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. The remedy

Because it has been found that Respondent Shuck, Respondent General Contractors, Respondent Construction Council, and the Respondent Union have engaged in certain unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As the contract between the General Contractors and the Construction Council on the one hand and the Union on the other covering employees of Respondent Shuck prevented Kieburtz from retaining his employment, it will be recommended that all Respondents, jointly and severally, make him whole for any loss he may have suffered as a result thereof by paying to Kieburtz an amount equal to that which he would have earned in employment with Shuck following July 31, 1953, until his employment would otherwise have terminated, less his net earnings during that period. Loss

of pay shall be determined by deducting from a sum equal to that which Kieburtz would normally have earned for each quarter or portion thereof his net earnings, if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back pay liability for any other quarter. The quarterly periods described herein shall begin with the first day of January, April, July, and October.² It is recommended further that Respondent Shuck make available to the Board or its agents, upon request, payroll and other records necessary to or convenient for a computation of the amount of back pay due.

Because the unlawful contract provisions assented to by all Respondents have a purpose and tendency to restrict employment opportunity to members of the Union, it will be recommended that all Respondents immediately cease giving effect to the union security clause in the November 1950 contract and refrain in the future from contracting to such effect in respect to any employer whose operations are in commerce or affect commerce.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. E. F. Shuck Construction Co., Inc., is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

² F. W. Woolworth Company, 90 NLRB 289.

2. Hod Carriers', Building and Common Laborers' Union, Local No. 242, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

3. By enforcing the unlawful provisions of the November 1950 contract, thus causing a discrimination in regard to the hire and tenure of employment of Richard B. Kieburtz, Respondent Shuck, Respondent General Contractors, and Respondent Construction Council have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

4. By such conduct the three Respondents named above have interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) of the Act.

5. By enforcing the unlawful provisions of the November 1950 contract, thus causing Respondent Shuck to discriminate against Richard B. Kieburtz in respect to his tenure of employment, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) and Section 8 (b) (1) (A) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, I recommend that:

1. The Respondent E. F. Shuck Construction Co.,

Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) The practice of conditioning hire of applicants or tenure of employment in laborer or hod carrier positions upon clearance or approval by Hod Carriers', Building and Common Laborers' Union, Local No. 242, AFL, or any other labor organization unless under a nondiscriminatory arrangement permitted by Section 8 (a) (3) of the Act, as amended.

(2) Performing, enforcing, or giving effect to its contract of November 1950 with the above-named Union in respect to union security or entering into or enforcing any extension, renewal, modification, or supplement thereof, or any superseding agreement with the same Union or any other labor organization containing union security provisions, except as authorized by Section 8 (a) (3) of the Act.

(3) In any like or similar manner interfering with, restraining, or coercing employees in the right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

(b) Take the following affirmative action which I find will effectuate the policies of the Act:

(1) Make whole Richard B. Kieburztz for any loss of pay he may have suffered by reason of the discrimination against him in the manner set forth in the section herein entitled "The remedy."

(2) Upon request make its records available to the Board to facilitate a back-pay computation.

(3) Post at each construction site in the jurisdiction covered by the Respondent Union in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by Respondent Shuck's representative, be posted by it immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by other material.

(4) Notify the Regional Director for the Nineteenth Region, in writing, within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps the Respondent Shuck has taken in compliance herewith.

2. The Associated General Contractors of America, Seattle Chapter, Inc., and The Seattle Construction Council, the officers, agents, successors, and assigns of each, shall:

(a) Cease and desist from:

(1) Enforcing or giving effect to any agreement with the Respondent Union or any other labor organization which conditions the hire of applicants for employment or the retention of employees in employment with any employer whose operations are in or affect commerce upon clearance by the Respondent Union or any other labor organization, except under a nondiscriminatory arrangement permitted by Section 8 (a) (3) of the Act, as amended.

(2) In any like or similar manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist any labor organization to bargain collectively through representatives of their own choosing, and to engage in collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

(b) Take the following affirmative action which I find will effectuate the policies of the Act:

(1) Make whole Richard B. Kieburzt for any loss of pay he may have suffered by reason of the discrimination against him in the manner set forth in the section herein entitled "The remedy."

(2) Post at each construction site of E. F. Shuck Construction Co., Inc., within the jurisdiction of the

Respondent Union, in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached hereto and marked Appendix B. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent General Contractors and the Respondent Construction Council, be posted by one of them immediately upon receipt thereof and be maintained by them for sixty (60) consecutive days thereafter. They shall take reasonable steps to insure that said notices are not altered, defaced, or covered by other material.

(3) Notify the Regional Director for the Nineteenth Region, in writing, within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps the said Respondents have taken in compliance herewith.

3. The Respondent Hod Carriers', Building and Common Laborers' Union, Local No. 242, AFL, its officers, representatives, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Performing or giving effect to its contract of November 1950 with the Respondents General Contractors and Construction Council covering employees of E. F. Shuck Construction Co., Inc., in respect to union security or entering into or enforcing any extension, renewal, modification, or supplement thereof which conditions the hire of applicants for employment upon clearance by the Union or any

other labor organization, except under a nondiscriminatory arrangement permitted by Section 8 (a) (3) of the Act, as amended.

(2) In any like or similar manner causing or attempting to cause the Respondent Shuck, the Respondent General Contractors, the Respondent Construction Council, or any other employer whose operations are in or affect commerce, to discriminate against any employee or prospective employee in violation of Section 8 (a) (3) of the Act.

(3) In any like or similar manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

(b) Take the following affirmative action which I find will effectuate the policies of the Act:

(1) Make whole Richard B. Kieburts for any loss of pay he may have suffered by reason of the discrimination against him in the manner set forth in the section herein entitled "The remedy."

(2) Post at its office in Seattle, Washington, and at each construction site of Respondent E. F. Shuck Construction Co., Inc., within the jurisdiction of the

Respondent Union, in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached hereto and marked Appendix C. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after having been duly signed by the Respondent Union's representative, be posted by it immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(3) Notify the Regional Director for the Nineteenth Region, in writing, within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps Respondent Union has taken in compliance herewith.

It is finally recommended that unless within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order the several Respondents notify the said Regional Director, in writing, in respect to complying with the foregoing recommendations, the Board issue an order requiring any non-complying Respondent to take the aforesaid action.

Dated this 15th day of January, 1954.

/s/ WALLACE E. ROYSTER,
Trial Examiner

APPENDIX A

Notice to All Employees: Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not maintain, give effect to, renew, or enforce any agreement with Hod Carriers', Building and Common Laborers' Union, Local No. 242, AFL, or any other labor organization covering our employees which requires job applicants to be members in good standing of any labor organization or to secure a work permit from any labor organization, nor will we maintain, renew, or enforce any agreement which contains union security provisions, except as authorized by Section 8 (a) (3) of the National Labor Relations Act, as amended.

We will not interfere with, restrain, or coerce our employees or prospective employees in the exercise of the right to self-organization to join or assist any labor organization or to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We will make whole Richard B. Kieburtz for any

loss of pay suffered as a result of the discrimination against him.

All our employees and prospective employees are free to become or remain, or to refrain from becoming or remaining members of any labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

E. F. SHUCK CONSTRUCTION
CO., INC.

(Employer)

Dated.....

By _____

(Representative)

(Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice to All Employees of E. F. Shuck Construction Co., Inc.: Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify the employees and prospective employees of E. F. Shuck Construction Co., Inc., that:

We Will Not maintain, give effect to, renew, or enforce any agreement with Hod Carriers', Build-

ing and Common Laborers' Union, Local No. 242, AFL, or any other labor organization covering employees of E. F. Shuck Construction Co., Inc., which requires job applicants to be members in good standing of any labor organization or to secure a work permit from any labor organization, nor will we maintain, renew, or enforce any agreement covering employees of an employer whose operations are in or affect commerce which contains union security provisions, except as authorized by Section 8 (a) (3) of the National Labor Relations Act, as amended.

We Will Not interfere with, restrain, or coerce the employees or prospective employees of E. F. Shuck Construction Co., Inc., in the exercise of the right to self-organization, to form labor organizations, to join or assist any labor organization to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will make whole Richard B. Kieburtz for any loss of pay suffered as a result of the discrimination against him.

All of the employees and prospective employees of E. F. Shuck Construction Co., Inc., are free to

become, to remain, or to refrain from becoming or remaining members of any labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

THE ASSOCIATED GENERAL
CONTRACTORS OF AMERICA,
SEATTLE CHAPTER, INC.

Dated.....

By.....

(Representative) (Title)

THE SEATTLE CONSTRUCTION
COUNCIL

Dated.....

By.....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX C

Notice to All Employees of E. F. Shuck Construction Co., Inc.: Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify the employees and prospective employees of E. F. Shuck Construction Co., Inc., that:

We Will Not maintain, give effect to, renew, enforce, or attempt to enforce any agreement between ourselves and The Associated General Contractors of America, Seattle Chapter, Inc., or The Seattle Construction Council, or E. F. Shuck Construction Co., Inc., which requires job applicants to be members in good standing of any labor organization or to secure a work permit from any labor organization, nor will we maintain, renew, or enforce any agreement which contains union security provisions covering employees of any employer whose operations are in or affect commerce, except as authorized by Section 8 (a) (3) of the National Labor Relations Act, as amended.

We Will Not cause or attempt to cause E. F. Shuck Construction Co., Inc., or any other employer whose operations are in commerce or affect commerce to discriminate against any employee or prospective employee, in violation of Section 8 (a) (3) of the Act.

We Will make whole Richard B. Kieburzt for any loss of pay suffered as a result of the discrimination against him.

HOD CARRIERS', BUILDING
AND COMMON LABORERS'
UNION, LOCAL NO. 242, AFL.
(Labor organization)

Dated.....

By.....

(Representative)

(Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service and Postal Return Receipts Attached.

[Title of Board and Cause.]

EXCEPTIONS OF ASSOCIATED GENERAL
CONTRACTORS OF AMERICA, SEATTLE
CHAPTER, INC., to INTERMEDIATE RE-
PORT AND RECOMMENDED ORDER

Associated General Contractors of America and its affiliate, Seattle Construction Council, hereby except to the intermediate report and recommended order of examiner Wallace E. Royster, dated January 15, 1954, in the following particulars:

I.

Exception is taken to the statement on page 4 beginning in line 50 as follows:

“The contract running between the general contractors and the union covering the operations of Shuck contains a patently unlawful provision in regard to union security.”

Exception is further taken to the matter following the quoted statement down to and including line 15 on page 5. The reason for this exception is that the examiner wholly failed to take into consideration the fact that the contract was made for

an entire industry, a part of which affects commerce and a part of which does not, and the clause relative to employment of union labor is unlawful only if wrongfully applied to cases affecting commerce. The agreement, including Section 11 thereof, as given effect by the parties has held the union security clause inapplicable in any case affecting commerce, consequently the contract itself is not per se illegal.

II.

Exception is taken to the matter contained in the paragraph beginning on line 17, page 5, reading as follows:

“By such conditioning of employment and retention of employment upon membership in or approval by the union, those three respondents encouraged membership in the union and thereby violated Sec. 8(a)(3) of the Act.”

This paragraph implies that respondent, Associated General Contractors, conditioned employment and retention of employment upon union membership. There is no evidence to indicate that Associated General Contractors had anything to do with employment or retention of employment in this case.

III.

Exception is taken to the statement beginning in line 18 on page 6 as follows:

“Because this discrimination stemmed from a contractual relationship between Shuck and the union, and because the contract was the product of negotiations between the General Contractors and the

Construction Council, on the one hand, and the union on the other, I find that the General Contractors and the Construction Council to the same extent as Shuck, discriminated in regard to the hire and tenure of employment of Kieburtz, thus encouraging membership in the union and thereby violating Sec. 8(a)(3) of the Act."

This statement is objected to because the contract itself was not illegal, but only its application, contrary to the intent of those who negotiated it, might be illegal, and there is no evidence that the Associated General Contractors or the Construction Council participated in the application of the union security clause in the instant case.

IV.

Exception is taken to the paragraph beginning on page 6 in line 33, as follows:

"By the discharge of Kieburtz the respondent Shuck, the General Contractors, and the Construction Council interfered with, restrained and coerced an employee in the exercise of his rights guaranteed in Sec. 7 of the Act and thereby violated Sec. 8-A1 of the Act."

This paragraph is objected to because there is no evidence that the General Contractors or the Construction Council had anything to do with the discharge of Kieburtz.

V.

Exception is taken to the findings under subdivision III starting on line 54, page 6, to the effect

that the activities of the respondents had a close, intimate and substantial relation to trade, traffic and commerce. This exception is based upon the fact that there is no evidence and no finding of fact to sustain the conclusion arrived at.

VI.

Exception is taken to the recommendation contained in the first paragraph under subdivision IV to the effect that the respondents jointly and severally *made* Kieburtz whole from any loss he may have suffered. This exception is taken because there is no authority to hold the Associated General Contractors or the Seattle Construction Council liable for any loss which Kieburtz may have suffered.

VII.

Exception is taken to the paragraph beginning on line 30, page 7, insofar as it recommends that all respondents immediately cease giving effect to the union security clause since said language implies that Associated General Contractors and Seattle Construction Council have been giving effect to the union security clause, which is not sustained by the evidence.

VIII.

Exception is taken to conclusion of law 3 insofar as it finds that General Contractors and Construction Council have enforced the union security provision of the contract, or have engaged in an unfair labor practice since there is no evidence or com-

petent finding to support the conclusion that the General Contractors or the Construction Council have enforced in any way the union security clause, or have engaged in any unfair labor practice.

IX.

Exception is taken to conclusion of law 4 since there is no evidence that any contract of Associated General Contractors or Construction Council has interfered with, restrained, or coerced any employee.

X.

Exception is taken to the whole of recommendation 2, beginning on page 9, line 13, respecting recommended action of the Associated General Contractors and Seattle Construction Council, first, because the recommendation implies that they are now engaging in the actions from which they are ordered to cease and desist, which implication is contrary to the evidence; second, because there is no legal obligation upon the part of these respondents to reimburse Mr. Kieburts for his loss; third, because these respondents have no control over the construction sites of E. F. Shuck and no means of seeing that notices posted there shall remain for any required period.

XI.

Exception is also taken to the Intermediate Report and Recommended Order for the reason that it undertakes to assume jurisdiction over Associated General Contractors and Seattle Construction

Council upon the basis of an act, namely, the negotiation of a contract, which was performed more than six months prior to the filing of the charge herein, and there is no evidence to sustain any finding that the Associated General Contractors or Seattle Construction Council performed any act, or enforced any contract, within six months prior to the filing of the charge herein. As required in Sec. 10 (b) of the National Labor Relations Act as a condition to jurisdiction.

XII.

Exception is taken to any order against Associated General Contractors or Seattle Construction Council for the reason that it is not found that either of them is an employer within the meaning of the National Labor Relations Act.

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Associated General Contractors of
America, Seattle Chapter, Inc., and Seattle
Construction Council.

GENERAL COUNSEL'S EXHIBIT No. 1

[Part 2]

[Title of Board and Cause.]

ORDER REMANDING PROCEEDING TO RE-
GIONAL DIRECTOR FOR FURTHER
HEARING

On January 15, 1954, the Trial Examiner issued his Intermediate Report in the above-entitled pro-

ceeding, and on the same day the proceeding was transferred to the Board. On February 5, 1954, the Respondent Union filed exceptions thereto, and a supporting brief. Thereafter, on September 7, 1954, the General Counsel moved the Board to make definite the Trial Examiner's findings of fact with respect to the effect of the Respondents' operations upon interstate commerce, or, in the alternative, that this proceeding be remanded for further hearing to receive more specific evidence of the extent of the operations of each Respondent in relation to their effect upon interstate commerce. The Board having duly considered the matter, and it being apparent from the Intermediate Report that the Trial Examiner predicated his jurisdictional findings on the Board's former standards,

It Is Hereby Ordered that the record in this proceeding be reopened and that a further hearing be held before a Trial Examiner for the purpose of obtaining additional commerce data; and

It Is Further Ordered that this proceeding be remanded to the Regional Director for the Nineteenth Region for the purpose of arranging such further hearing, and that the said Regional Director be, and he hereby is, authorized to issue notice thereof; and

It Is Further Ordered that, upon the conclusion of the hearing, (unless the parties waive their rights thereto), the Trial Examiner shall prepare and serve upon the parties a Supplemental Intermediate Report containing findings of fact upon the evidence received pursuant to the provisions of

this order, and that following service of such Supplemental Intermediate Report upon the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D. C., February 9, 1955.

By direction of the Board:

FRANK M. KLEILER

Executive Secretary

Affidavit of Service and Postal Return Receipts Attached.

[Title of Board and Cause.]

SUPPLEMENTAL INTERMEDIATE REPORT

Melton Boyd, for the General Counsel. Lycette, Diamond & Sylvester, by Lyle Iversen, of Seattle, Wash., for the AGC. Arthur S. Quigley, of Seattle, Wash., for Shuck. Roy E. Jackson, of Seattle, Wash., for the Union.

Before: Martin S. Bennett, Trial Examiner.

An Intermediate Report and Recommended Order in the above-entitled case having been issued by Trial Examiner Wallace E. Royster on January 15, 1954, exceptions were filed thereto by Respondent AGC, and, on September 7, 1954, the General Counsel moved, inter alia, that¹ the proceeding be

¹ The Board's order of remand, described below, inadvertently, it appears, attributes these exceptions to Hod Carriers, Building and Common Laborers Union, Local No. 242, Respondent Union.

remanded for further hearings with respect to the effect of Respondents' operations upon interstate commerce.

On February 9, 1955, the Board ordered that the record in the proceeding be reopened, that a further hearing be held before a Trial Examiner for the purpose of obtaining additional commerce data, and that "the Trial Examiner shall prepare and serve upon the parties a Supplemental Intermediate Report containing findings of fact upon the evidence pursuant to the provisions of this order * * * "

Pursuant to notice, a further hearing was held consonant with the foregoing order before the undersigned Trial Examiner at Seattle, Washington, on March 4, 1955. All the parties were represented by counsel, participated in the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to develop evidence bearing upon the issue. One of the appearances was made for "the witness Shuck." Counsel stated further that "I have questioned, there being no appeal, that I am appearing for the Shuck Company at this hearing." I find that Respondent, E. F. Shuck Construction Co., Inc., was duly served with notice of this hearing and that appearance was made by the same counsel that represented that Respondent at the original hearing. At the outset of the hearing I denied a motion by Respondent AGC that I restrict my function in this proceeding solely to presiding over the taking of testimony and that I refrain from making findings

of fact. At the close of the hearing the parties were given an opportunity to argue orally and to file briefs. Oral argument was presented and briefs were waived.

Upon the record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact²

Seattle Construction Council is a division of the Seattle Chapter of the Associated General Contractors of America, whose members are engaged in specialty contracting as contrasted with general contracting work.

The Seattle Chapter of the AGC has for some years, as its prime purpose, engaged in collective bargaining with labor organizations in behalf of its members, all contracting firms in Seattle and surrounding areas in the State of Washington, and signs association-wide agreements with labor organizations in behalf of such members.

The construction work performed by the members of the Seattle Chapter is in excess of \$100,000,000 per annum. Of this, at least 10 percent represents work performed outside the State of Washington by the Washington contractors who belong to this Chapter. Such was the case in 1953

² The findings of fact which follow are based solely upon the evidence developed in the hearing held before me, the order of the Board having stated that the Supplemental Intermediate Report should contain "findings of fact upon the evidence received pursuant to the provisions of this order."

as it is at present. In fact, one of the members of the Chapter, not individually involved herein, commenced a \$40,000,000 construction project in the Territory of Alaska during 1953.

In addition, during 1953, various members of the Seattle Chapter of AGC, not individually involved herein, engaged in construction directly involved with the national defense effort. These projects were carried out under direct contracts with the U. S. Government, and included, in the State of Washington, construction of a powder magazine for the U. S. Navy, a contract in the amount of \$1,397,000; a boat storage plant for the U. S. Navy, a contract in the amount of \$1,321,000; transmitter facilities for the Atomic Energy Commission, a contract in the amount of \$437,000; and, a later phase of the last described construction, a contract in the amount of \$1,278,000.

Respondents stress herein the fact that the roster of members of the Seattle Chapter in 1953 included "E. F. Shuck" but not "E. F. Shuck Construction Co., Inc.," the latter named as a respondent herein. The current roster of the membership lists this business concern in its corporate name which is identical with the description of this Respondent in the complaint.

The fact of the matter is that since 1949, Shuck has not engaged in the construction business as an individual entrepreneur. E. F. Shuck, Sr., as an individual was engaged in building construction for a number of years. It appears that he belonged to the Seattle Chapter in this capacity as an indi-

vidual. In 1949, the business was incorporated and continued to function in substantially the same line of endeavor. Although connected with the corporation, as is his son, Shuck's precise interest in the corporation, whether complete or partial, is not disclosed.

Membership by this business entity in the Seattle Chapter was continued and annual dues therein have been paid by the corporation since 1949. E. F. Shuck, Sr., is active in the corporate business and, according to his testimony, he has not engaged in the construction or contracting business as an individual since 1949. Nor is he engaged in any other commercial venture as an individual at the premises of Respondent, E. F. Shuck Construction Co., Inc., Shuck considers the dues paid to the Seattle Chapter by the company bearing his name to be a corporate expense. In fact, he did not contend in his testimony that he was engaged in any business venture, construction or otherwise, as an individual.

It is clear that Seattle Chapter of AGC has until the present year continued to list Shuck as a member in his individual capacity, although it does bargain for all its members and this bargaining since 1949 has perforce included the corporate respondent herein. The testimony of Colton Harper, assistant member of the Seattle Chapter, discloses that this minor disparity has existed for this period of years primarily because of inertia, namely, the failure of the member to take steps to amend the registration.

Harper testified that construction companies are

constantly incorporating or changing their form of doing business, but that the usual procedure to accomplish a change of registration is for the member to write to the Seattle Chapter and request the change of name. In this case, although Shuck incorporated in 1949 and has been represented in collective bargaining in that corporate capacity since 1949 by the Seattle Chapter, no steps were taken to procure the change of name until recently.

It would appear from the foregoing that the operations of all the named Respondents herein fall within the Board's jurisdiction. *N. L. R. B. v. Gottfried Baking Co., Inc.*, 210 F. 2d 772 (C. A. 2); *Leonard v. N. L. R. B.*, 197 F. 2d 435, 205 F. 2d 355 (C. A. 9); *Katz v. N. L. R. B.*, 196 F. 2d 411 (C. A. 9); *Motor Truck Association of Southern California*, 110 NLRB No. 263; *Insulation Contractors of Southern California, Inc.*, 110 NLRB No. 105; *Capital Bear Distributors Association*, 109 NLRB No. 36; and *Niagra Beer Distributors Association*, 108 NLRB 2217. However, as I construe the Board's order relative to this hearing, any conclusions of law or recommendations by the undersigned would be beyond the scope of the remand. Therefore, none are made herein.

Dated this 14th day of April, 1955.

/s/ MARTIN S. BENNETT
Trial Examiner

Affidavit of Service and Postal Return Receipts
Attached.

[Title of Board and Cause.]

EXCEPTIONS OF ASSOCIATED GENERAL
CONTRACTORS OF AMERICA, SEATTLE
CHAPTER, INC., TO SUPPLEMENTAL
INTERMEDIATE REPORT

Associated General Contractors of America and its affiliate, Seattle Construction Council, hereby except to the supplemental intermediate report of examiner Martin S. Bennett, dated April 14, 1955 in the following particulars:

I.

Exception is taken to the entire proceeding for the reason that at the supplemental hearing the entire subject matter of the proceeding was not before the examiner, and a fair picture of the situation could not be presented under the circumstances.

II.

Exception is taken to the intermediate report for the reason that no ruling was made upon motions presented to the examiner for the reinstatement of other respondents, namely, Hod Carriers, Building & Common Laborers, Union Local No. 242 AFL, and E. F. Shuck Construction Co., Inc., as active parties for all purposes of further proceedings in the matter.

III.

Exception is taken to the second paragraph of

Findings of Fact on page 2, beginning on line 32, to the extent that the finding recites that the prime purpose of the Seattle Chapter of AGC has been collective bargaining with labor organizations. This exception is made for the reason that there is no evidence to indicate that this is the prime purpose of the Seattle Chapter and said recital is contrary to the fact, since Seattle Chapter, Associated General Contractors, has many other purposes and collective bargaining with labor organizations is only one of its purposes.

IV.

Exception is taken to the fourth paragraph on page 3 of the Findings insofar as it recites that bargaining of Seattle Chapter of AGC has been on behalf of members including the corporate defendant herein. Further exception is made to said paragraph insofar as it speaks of the membership of E. F. Shuck personally, rather than the corporate defendant herein as a minor disparity. This exception is made for the reason that these conclusions are not supported by the evidence and in fact there is no evidence that the corporate defendant, E. F. Shuck Construction Co., Inc. is or ever was a member of the Associated General Contractors, Seattle Chapter, and said corporate defendant is a separate entity from the member who is Mr. E. F. Shuck, personally, and there is no evidence that negotiations were conducted for non-members or that the difference between the individual and the corporation is a minor disparity.

V.

Exception is taken to the fifth paragraph on page 3 of the Findings insofar as it recites that Shuck, Inc. has been represented in the collective bargaining in its corporate capacity by the Seattle Chapter for the reason that there is no testimony to indicate that the corporation has been represented by the Seattle Chapter.

VI.

Exception is taken to the last paragraph beginning on page 3 of the Findings insofar as it finds that the Seattle Chapter, Associated General Contractors falls within the Board's jurisdiction. This exception is based upon the fact that the conclusion here arrived at is not supported by any of the previous findings, nor by the testimony inasmuch as it clearly appears from the testimony that this respondent is not an employer as defined in the National Labor Relations Act.

VII.

Exception is taken to the supplemental intermediate report for the reason that the same fails to make a finding to the effect that this respondent negotiates for both employers engaged in business not affecting commerce and employers engaged in business affecting commerce, although the evidence clearly shows without contradiction that a portion of this respondent's membership engage in strictly local business.

VIII.

Exception is taken to the supplemental intermediate report for the reason that the same results in a finding that the Board has jurisdiction over this respondent, although no evidence was produced to establish that this respondent as distinguished from its members is engaged in commerce or that its business in commerce amounts to \$50,000.00 a year or any other sum.

LYCETTE, DIAMOND & SYLVESTER
Attorneys for Associated General Contractors of
America, Seattle Chapter, Inc. and Seattle
Construction Council

/s/ By LYLE L. IVERSEN

Affidavit of Service Attached.

United States of America

Before the National Labor Relations Board

Case No. 19-CA-851

Case No. 19-CB-261

E. F. Shuck Construction Co. Inc. and The Associated General Contractors of America, Seattle Chapter, Inc. and The Seattle Construction Council Hod Carriers, Building and Common Laborers Union, Local No. 242, AFL and Richard B. Kieburtz, an Individual

DECISION AND ORDER

On January 15, 1954, Trial Examiner Wallace E. Royster issued his Intermediate Report in the

above-entitled proceeding, finding that the Respondents had engaged in certain unfair labor practices within the meaning of the Act, and recommending that they cease and desist therefrom, and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, Respondents Associated General Contractors of America, Seattle Chapter, Inc. and Seattle Construction Council filed exceptions to the Intermediate Report and a supporting brief. On February 9, 1955, the Board ordered that the record in the proceeding be reopened, that a further hearing be held before a Trial Examiner for the purpose of obtaining additional commerce data, and that "the Trial Examiner shall prepare and serve upon the parties a Supplemental Intermediate Report containing findings of fact upon the evidence pursuant to the provisions of this order." On April 14, 1955, Trial Examiner Martin S. Bennett issued his Supplemental Intermediate Report in the above-entitled proceedings setting forth his findings of fact pursuant to the provisions of the order of the Board issued February 9, 1955. Thereafter, Respondents Associated General Contractors of America, Seattle Chapter, Inc. and Seattle Construction Council filed exceptions to the Supplemental Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiners made at the initial hearing and the supplemental hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Board has considered the Intermediate Report, the Supplemental Intermediate Report, the exceptions to both the Intermediate and Supplemental Intermediate Reports, and the briefs in support of the exceptions, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiners, with the following additions:

It appears from the findings of fact made in the Supplemental Intermediate Report that the construction work performed by members of the Seattle Chapter of the Associated General Contractors of America is in excess of \$100,000,000 a year, and that of this amount, at least 10 percent represents work performed outside the State of Washington by the Washington contractors who belong to this Chapter. It also appears that during 1953, various members of the Seattle Chapter of the Associated General Contractors engaged in construction within the State of Washington, directly involved in the national defense effort, including projects under direct contracts with the United States Government, i.e., construction of a powder magazine for the Navy in the sum of \$1,397,000; a boat storage plant for the Navy in the sum of \$1,321,000; and transmitter facilities for the Atomic Energy Commission in the sums of \$437,000 and \$1,278,000, respectively.

On the basis of the foregoing, we find that the operations of all the named Respondents herein fall within the Board's jurisdiction and that it will

effectuate the policies of the Act to assert jurisdiction herein.¹

In agreement with the Trial Examiner in the original proceeding, we find that by the discharge of Kieburtz, the Respondent Shuck discriminated in regard to his hire and tenure of employment, thus encouraging membership in the Union, and thereby violating Section 8 (a) (3) of the Act; that by giving effect to the unlawful union-security provision in the contract, the Respondent Union caused Shuck to discriminate in regard to the hire and tenure of employment, in violation of Section 8 (a) (3), and thereby violated Section 8 (b) (2) of the Act; by such conduct Respondents Shuck, the Associated General Contractors and the Seattle Construction Council interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and thereby violated Section 8 (a) (1) of the Act; and that the Respondent Union thereby restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and thereby violated Section 8 (b) (1)

¹ Motor Truck Association, 110 NLRB 2151; Capital Beer Distributors, 109 NLRB 178; Niagara Beer Distributors, 108 NLRB 2217; Insulation Contractors, 110 NLRB 638. In Insulation Contractors, the Board stated:

Although the Board has recently announced new minimum requirements for the assertion of its jurisdiction, we will adhere to our past practice of considering all association members who participate in multi-employer bargaining as a single employer for jurisdictional purposes.

(A) of the Act. We further find, as did the Trial Examiner in the original proceeding, that as the discrimination found hereinabove stemmed from a contractual relationship between Shuck and the Union, and because the contract was the product of negotiations between the Associated General Contractors and the Seattle Construction Council on the one hand and the Union on the other, that the Associated General Contractors and the Seattle Construction Council discriminated in regard to the hire and tenure of employment of Kieburtz to the same extent as Shuck, thus encouraging membership in the Union and thereby violating Section 8 (a) (3) of the Act.²

Order

Upon the entire record in these cases, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders:

1. The Respondent E. F. Shuck Construction

² See *George D. Auchter Co.*, 102 NLRB 881, enforced 209 F.2d 273 (C. A. 5). With respect to the Respondents' contention that the roster of members of the Seattle Chapter of the Associated General Contractors in 1953 included "E. F. Shuck" but not "E. F. Shuck Construction Co. Inc.," it seems clear that the business was incorporated as far back as 1949 and that it has been represented in collective bargaining by the Seattle Chapter in that corporate capacity. The record evidence adequately supports the factual findings made in the Supplemental Intermediate Report.

Co. Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) The practice of conditioning hire of applicants or tenure of employment in laborer or hod carrier positions upon clearance or approval by Hod Carriers', Building and Common Laborers' Union, Local No. 242, AFL, or any other labor organization except under an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act, as amended;

(2) Performing, enforcing, or giving effect to its contract of November 1950 with the above-named Union in respect to union security or entering into or enforcing any extension, renewal, modification, or supplement thereof, or any superseding agreement with the same Union or any other labor organization containing union-security provisions, except as authorized by Section 8 (a) (3) of the Act, as amended;

(3) In any like or similar manner interfering with, restraining, or coercing employees in the right of self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

condition of employment, as authorized by Section 8 (a) (3) of the Act, as amended.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Make whole Richard B. Kiebertz for any loss of pay he may have suffered by reason of the discrimination against him in the manner set forth in the section of the Intermediate Report entitled "The Remedy";

(2) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order;

(3) Post at each construction site in the jurisdiction covered by the Respondent Union in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached to the Intermediate Report as Appendix A.³ Copies of

³ This notice, however, shall be, and it hereby is, amended by striking from the first paragraph thereof the words "The Recommendations of a Trial Examination" and substituting in lieu thereof the words "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by Respondent Shuck's representative, be posted by it immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by other material;

(4) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order what steps Respondent Shuck has taken to comply herewith.

2. The Associated General Contractors of America, Seattle Chapter, Inc., and The Seattle Construction Council, the officers, agents, successors, and assigns of each, shall:

(a) Cease and desist from:

(1) Enforcing or giving effect to any agreement with the Respondent Union or any other labor organization which conditions the hire of applicants for employment or the retention of employees in employment with any employer whose operations are in or affect commerce upon clearance by the Respondent Union or any other labor organization, except under an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act, as amended;

(2) In like or similar manner interfering with, restraining, or coercing employees in the exercise of the right of self-organization, to form labor or-

ganizations, to join or assist any labor organization to bargain collectively through representatives of their own choosing, and to engage in collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act, as amended.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Make whole Richard B. Kieburtz for any loss of pay he may have suffered by reason of the discrimination against him in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(2) Post at each construction site of E. F. Shuck Construction Co. Inc., within the jurisdiction of the Respondent Union, in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached to the Intermediate Report as Appendix B.⁴ Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by Respondent Associated General Contractors and Respondent Seattle Construction Council, be posted by one of them immediately upon receipt

⁴ See footnote 3 for amendments to notice attached to Intermediate Report as Appendix B.

thereof and maintained by them for sixty (60) consecutive days thereafter. They shall take reasonable steps to insure that said notices are not altered, defaced, or covered by other material;

(3) Notify the Regional Director for the Nineteenth Region, in writing, within twenty (20) days from the date of this Order what steps the said Respondents have taken to comply herewith.

3. Respondent Hod Carriers', Building and Common Laborers' Union, Local No. 242, AFL, its officers, representatives, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Performing or giving effect to its contract of November 1950 with the Respondents Associated General Contractors and Seattle Construction Council covering employees of E. F. Shuck Construction Co. Inc., in respect to union security or entering into or enforcing any extension, renewal, modification, or supplement thereof which conditions the hire of applicants for employment upon clearance by the Union or any other labor organization, except under an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act, as amended;

(2) In like or similar manner causing or attempting to cause Respondent Shuck, Respondent Associated General Contractors, Respondent Seattle Construction Council or any other employer whose operations are in or affect commerce, to discrimi-

nate against any employee or prospective employee in violation of Section 8 (a) (3) of the Act, as amended;

(3) In like or similar manner straining or coercing employees in the exercise of the right of self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act, as amended.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Make whole Richard B. Kieburtz for any loss of pay he may have suffered by reason of the discrimination against him in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(2) Post at its office in Seattle, Washington, and at each construction site of Respondent E. F. Shuck Construction Co. Inc., within the jurisdiction of the Respondent Union, in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached to the Inter-

mediate Report as Appendix C.⁵ Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after having been duly signed by the Respondent Union's representative, be posted by it immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by it to insure that the said notices are not altered, defaced, or covered by any other material.

(3) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order what steps Respondent Union has taken to comply herewith.

Dated, Washington, D. C., October 28, 1955.

[Seal] PHILIP RAY RODGERS,
 Acting Chairman.

IVAR H. PETERSON, Member.

BOYD LEEDOM, Member.

National Labor Relations Board.

Affidavit of Mail and Return Postal Return Receipts Attached.

⁵ See footnote 3 for amendments to notice attached to Intermediate Report as Appendix C.

In the United States Court of Appeals
for the Ninth Circuit

No. 15084

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. F. SHUCK CONSTRUCTION CO., INC.; THE
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, SEATTLE CHAPTER, INC.
AND THE SEATTLE CONSTRUCTION
COUNCIL; AND HOD CARRIERS', BUILD-
ING and COMMON LABORERS' UNION,
LOCAL NO. 242, AFL,

Respondents.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled “E. F. Shuck Construction Co. Inc. and The Associated General Contractors of America, Seattle Chapter, Inc. and The Seattle Construction Council” and “Hod Carriers, Building and Common Laborers Union, Local No. 242, AFL and Richard B. Kieburtz, an Individual,” the same be-

ing known as Case Nos. 19-CA-851 and 19-CB-261 respectively before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said consolidated proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Wallace E. Royster on October 29 and 30, 1953, together with all exhibits introduced in evidence.

2. Copy of Trial Examiner Royster's Intermediate Report and Recommended Order (annexed to item 9 hereof); copy of Order transferring cases to the National Labor Relations Board, both issued on January 15, 1954, together with affidavit of service and United States Post Office return receipts thereof.

3. Combined Exceptions of Respondents Associated General Contractors of America, Seattle Chapter, Inc. and The Seattle Construction Council¹ to the Trial Examiner's Intermediate Report and Recommended Order, received by the Board on February 5, 1954.

4. General Counsel's motion to make definite commerce findings, or, in the alternative to remand

¹ Inadvertently referred to in Board's Order remanding proceeding for further hearing as exceptions of Hod Carriers', Building and Common Laborers Union, Local No. 242, AFL, Respondent Union herein.

the case for further hearing to receive more specific evidence in regard to commerce, received by the Board on September 7, 1954. (Granted—see Board's Order remanding proceeding to Regional Director for Further Hearing.)

5. Affidavit of service of Board's Order remanding proceeding to Regional Director for Further Hearing dated February 9, 1955, together with United States Post Office return receipts thereof. (Order remanding proceeding is marked General Counsel's Exhibit 1—Part 2, and is contained in Volume V of the Certified Record.)

6. Stenographic transcript of testimony taken before Trial Examiner Martin S. Bennett in further hearing held on March 4, 1955, pursuant to remand, together with all exhibits introduced in evidence.

7. Copy of Trial Examiner Bennett's Supplemental Intermediate Report (annexed to item 9 hereof); copy of Order transferring cases to the National Labor Relations Board, both issued on April 14, 1955, together with affidavit of service and United States Post Office return receipts thereof.

8. Combined Exceptions of Respondents Associated General Contractors of America, Seattle Chapter, Inc. and The Seattle Construction Council to the Trial Examiner's Supplemental Intermediate Report, received by the Board on May 5, 1955.

9. Copy of Decision and Order issued by the National Labor Relations Board on October 28, 1955, with copies of Intermediate Report and Supplemental Intermediate Report annexed, together

with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 7th day of May, 1956.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board.

[Endorsed]: No. 15084. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. E. F. Shuck Construction Co., Inc., The Associated General Contractors of America, Seattle Chapter, Inc., The Seattle Construction Council and Hod Carriers' Building and Common Laborers' Union, Local No. 242, AFL., Respondents, and Associated General Contractors of America, Seattle Chapter, Inc., and its affiliate Seattle Construction Council, Petitioners, vs. National Labor Relations Board, Respondent. Transcript of Record. Petition for Enforcement and Petition for Review of Order of the National Labor Relations Board.

Filed: May 11, 1956.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15084

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. F. SHUCK CONSTRUCTION CO. INC.; THE
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, SEATTLE CHAPTER, INC.
AND THE SEATTLE CONSTRUCTION
COUNCIL; AND HOD CARRIERS', BUILD-
ING AND COMMON LABORERS' UNION,
LOCAL NO. 242, AFL, Respondents.

PETITION FOR ENFORCEMENT OF AN OR-
DER OF THE NATIONAL LABOR RELA-
TIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to
the National Labor Relations Act, as amended (61
Stat. 136, 29 U.S.C., Secs. 151, et seq.), hereinafter
called the Act, respectfully petitions this Court for
the enforcement of its order against Respondents,
E. F. Shuck Construction Co., Inc., Seattle, Wash-
ington (hereinafter called Respondent Company),
its officers, agents, successors, and assigns; The As-

sociated General Contractors of America, Seattle Chapter, Inc. (hereinafter called Respondent AGC), and The Seattle Construction Council (hereinafter called Respondent Construction Council), the officers, agents, successors, and assigns of each; and Hod Carriers', Building and Common Laborers' Union, Local 242, AFL (hereinafter called Respondent Union), its officers, representatives, agents, successors, and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "E. F. Shuck Construction Co. Inc. and The Associated General Contractors of America, Seattle Chapter, Inc. and The Seattle Construction Council, Case No. 19-CA-851" and "Hod Carriers, Building and Common Laborers Union, Local No. 242, AFL and Richard B. Kieburztz, an Individual, Case No. 19-CB-261."

In support of this petition the Board respectfully shows:

(1) Respondent Company is a Washington corporation engaged in business in the State of Washington, Respondents AGC and Construction Council are engaged in negotiating collective bargaining agreements with labor organizations on behalf of their members in the State of Washington, and Respondent Union is a labor organization engaged in promoting and protecting the interests of its members in the State of Washington, all within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the

National Labor Relations Act, as amended.

(2) Upon due proceeding had before the Board in said matter, the Board on October 28, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to Respondent Company, its officers, agents, successors, and assigns; Respondents AGC and Construction Council, the officers, agents, successors, and assigns of each; and Respondent Union, its officers, representatives, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending copies thereof postpaid, bearing Government frank, by registered mail, to Respondents' Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring

Respondent Company, its officers, agents, successors, and assigns; Respondents AGC and Construction Council, the officers, agents, successors, and assigns of each; and Respondent Union, its officers, representatives, agents, successors, and assigns, to comply therewith.

Dated at Washington, D. C., this 29th day of March, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board.

Certificate of Service Attached.

[Endorsed]: Filed Apr. 2, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER AND PETITION FOR REVIEW OF
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, SEATTLE CHAPTER, INC.,
AND THE SEATTLE CONSTRUCTION
COUNCIL

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

Associated General Contractors of America, Seattle Chapter, Inc. and its affiliate, Seattle Construction Council, hereby answers the Petition for En-

forcement heretofore filed by the National Labor Relations Board, and petitions for a review by this court of the proceedings of the National Labor Relations Board and the order of said Board in this matter. Answering the allegations of the Petition for Enforcement, this respondent alleges:

I.

Answering Paragraph (1) of the Petition, this respondent states, Seattle Chapter, Associated General Contractors of America, is a Washington corporation, functioning as a business association to advance the common good of its members, and among its other activities, it represents its members in industrywide collective bargaining with labor organizations. This respondent carries on its activities within the Ninth Circuit. Except as specifically admitted herein, the allegations of Paragraph (1) of the Petition for Enforcement are denied.

II.

Answering Paragraph (2) of the Petition, this respondent admits the entry of an order by the National Labor Relations Board as therein alleged, and that the same was served upon it, but denies that said order was legal or valid.

III.

Answering Paragraph (3) of the Petition for Enforcement, this respondent admits the same.

Petition for Review

This respondent petitions this court to review the Order of the National Labor Relations Board in the Consolidated cases before it designated Case No. 19-CA-851 and 19-CB-261 insofar as said Order was directed against this respondent.

I.

This Petition for Review is made pursuant to the provisions of subparagraph (f) of Section 160, entitled 29 United States Code. This respondent alleges that the transcript which will be filed by the National Labor Relations Board in connection with its Petition for Enforcement will be the same transcript as would be involved in this Petition for Review.

II.

Seattle Construction Council is the name of an activity of Seattle Chapter, Associated General Contractors of America, and is not a separate entity, and Seattle Chapter and Seattle Construction Council are one and the same.

III.

The Order of the National Labor Relations Board is invalid and erroneous for the following reasons:

This respondent is not subject to the jurisdiction of the National Labor Relations Board and is not and at no time material hereto, was it an employer within the meaning of the National Labor Relations Act, nor was it engaged in commerce.

The procedure was not commenced within the time limited by law, particularly Section 10 (d) of the National Labor Relations Act.

It was not shown that the alleged unfair labor practice affected commerce.

It was not established that this respondent engaged in any unfair labor practice.

The findings of the National Labor Relations Board do not support the Order which it entered against this respondent, and it committed error in entering the Order it did.

Wherefore, this respondent prays that the Order of the National Labor Relations Board be reviewed and set aside as to it, and that the Petition for Enforcement be denied.

LYCETTE, DIAMOND &
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Associated General Contractors of
America, Seattle Chapter, Inc., and Seattle
Construction Council.

[Endorsed]: Filed Apr. 20, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

In this proceeding, petitioner, the National Labor Relations Board, will urge and rely upon the following points:

1. The Board properly asserted jurisdiction over respondents.

2. The Board properly found that respondent E. F. Shuck Construction Co., Inc., violated Sections 8 (a) (1) and 8 (a) (3) of the Act by giving effect to an illegal union-security provision in its contract with respondent Hod Carriers, Building and Common Laborers Union, Local No. 242, AFL, and discharging employee Richard B. Kieburtz pursuant thereto.

3. The Board properly found that respondent Hod Carriers, Building and Common Laborers Union, Local No. 242, AFL, violated Sections 8 (b) (1) (A) and 8 (b) (2) of the Act by giving effect to this illegal union-security provision in the contract with respondent E. F. Shuck Construction Co., Inc., and thereby causing the Company to discharge employee Kieburtz in violation of Section 8 (a) (3) of the Act.

4. The Board properly found that respondents Associated General Contractors of America, Seattle Chapter, Inc., and the Seattle Construction Council violated Sections 8 (a) (1) and 8 (a) (3) of the Act in that Kieburtz' discharge stemmed from the

illegal union-security provision which they had negotiated with respondent Hod Carriers, Building and Common Laborers Union, Local No. 242, AFL.

5. The Board's order is valid and proper.

Dated at Washington, D. C., this 7th day of May, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board.

[Endorsed]: Filed May 10, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY ASSOCIATED GENERAL CON-
TRACTORS OF AMERICA, SEATTLE
CHAPTER, INC.

Respondent, Associated General Contractors of America, Seattle Chapter, Inc. and its affiliate, The Seattle Construction Council, will rely upon the following points in connection with the petition for review:

I.

This respondent is not subject to the jurisdiction of the National Labor Relations Board and is not, and at no time material hereto, was it an employer engaged in inter-state commerce within the meaning of the National Labor Relations Act.

II.

The procedure was not commenced within the time limited by law, particularly Section 10d of the National Labor Relations Act.

III.

It was not shown that the alleged unfair labor practice affected commerce.

IV.

It was not established that this respondent engaged in any unfair labor practice.

V.

The findings of the National Labor Relations Board do not support the order entered against this respondent.

LYCETTE, DIAMOND &
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Associated General Contractors of
America, Seattle Chapter, Inc., and The Seat-
tle Construction Council.

Certificate of Service Attached.

[Endorsed]: Filed May 25, 1956. Paul P. O'Brien,
Clerk.

Before the National Labor Relations Board
Nineteenth Region

19-CA-851

In the Matter of: E. F. Shuck Construction Co., Inc., and The Associated General Contractors of America, Seattle Chapter, Inc., and The Seattle Construction Council, and Richard B. Kieburtz, an Individual.

19-CB-261

Hod Carriers', Building and Common Laborers' Union, Local No. 242, AFL, and Richard B. Kieburtz, an Individual.

TRANSCRIPT OF PROCEEDINGS

Room 407-G, U. S. Courthouse, Fifth and Madison Streets, Seattle, Washington, Thursday, October 29, 1953.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock, a.m.

Before: Wallace E. Royster, Esq., Trial Examiner.

Appearances: Melton R. Boyd, Esq., Nineteenth Region, National Labor [1*] Relations Board, 407 U. S. Courthouse, Seattle, Washington, appearing as counsel for the General Counsel.

Carl E. Croson, Esq., and Arthur G. Quigley, Esq., 900 Insurance Building, Seattle, Washington, appearing on behalf of E. F. Shuck Construction Company, Inc., Respondent Employer.

* Page numbering appearing at top of page of original certified Reporter's Transcript.

Lyle L. Iversen, Esq., Lycette, Diamond & Sylvester, 800 Hoge Building, Seattle, Washington, appearing for and on behalf of The Associated General Contractors of America, Seattle Chapter, Inc., and The Seattle Construction Council.

Roy E. Jackson, Esq., 1207 American Building, Seattle, Washington, appearing on behalf of Hod Carriers', Building and Common Laborers' Union, Local No. 242, AFL, Respondent Union. [2]

Proceedings

Trial Examiner Royster: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of E. F. Shuck Construction Company, The Associated General Contractors of America, Seattle Chapter, Inc., and the Seattle Construction Council.

As I read that, those are all the Respondents, is that correct?

Mr. Boyd: That is correct.

Mr. Iversen: That is correct. However, those two are actually the same thing, the Seattle Construction Council is merely a designation of a portion of the activities of the Seattle Chapter of A. G. C.

Trial Examiner Royster: Well, those three are Respondents, or two, perhaps, more accurately, are Respondents in Case No. 19-CA-851.

A further respondent is Hod Carriers', Building and Common Laborers' Union, Local No. 242, AFL,

in Case No. 19-CB-261, the cases obviously having been consolidated. [4]

* * * * *

Mr. Boyd: Before presenting the witness, I would at this time offer in evidence the General Counsel's Exhibit No. 1, which contains the formal papers, all of which have been served upon the parties in this case.

Mr. Iversen: No objection.

Mr. Jackson: No objection.

Mr. Croson: No objections.

Trial Examiner Royster: Received. [7]

* * * * *

Mr. Boyd: Mr. Harper is called under Rule 43 (b).

COLTON D. HARPER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): Your name is what, please?

A. Colton D. Harper.

Q. What is your employment, Mr. Harper?

A. I work for the Associated General Contractors of America, Seattle Chapter, as assistant manager.

Mr. Boyd: Off the record, if I may.

Probably better on the record.

I will inform the Trial Examiner that the Seattle Chapter of the A. G. C., whom we will refer to as "the A. G. C.", although we are referring to the

(Testimony of Colton D. Harper.)

Seattle Chapter, and to a constituent portion of it known as the Seattle Construction Council, I have requested them to produce for this hearing conformed copies of labor agreement dated November 3, 1950. Compliant with that request, they are produced here today, and I would have these documents now marked General Counsel's Exhibit No. 2. [8]

* * * * *

Trial Examiner Royster: Without objection, General Counsel's Exhibit No. 2 is received. [9]

[See pages 205-209.]

* * * * *

Q. (By Mr. Boyd): Mr. Harper, named in that agreement, as the agency by and through which the Seattle Chapter executed this agreement, is the Seattle Construction Council. Is it not true that the Seattle Construction Council, as indicated by your counsel here today, is a part of, or a segment of, the membership of the Seattle Chapter and controlled by Article 24 and Section 4 thereof, of the by-laws of the Seattle Chapter of A. G. C.?

A. Yes. That is true.

Q. In regard to this contract in evidence, Exhibit 2 of the General Counsel, is it presently in effect?

A. This particular agreement?

Q. Yes. A. Yes, it is.

Q. Is there at this time indication that it will be continued in effect, so far as the parties to the contract are disposed?

A. The indications are at this time that that agreement will expire this year.

(Testimony of Colton D. Harper.)

Q. When? A. The end of this year.

Q. At the end of this year. And by what act is it to expire at the end of this year?

A. Most of the signatures that are on that agreement, as it is now written, abrogated the agreement and have written separate contracts with other trade associations who employ the [10] majority of their members. At the present time we have only the Laborers' 242, and the resilient floor layers, the cement finishers and the iron workers on that agreement. That is four local Unions. And of those four, they have all indicated a desire to abrogate it, or they have abrogated it, with the exception of the resilient floor layers. And we expect that momentarily.

Q. Now, as between the Seattle Chapter of A. G. C. and Laborers' Union 242, the effective date of its termination will be when, according to the notifications that have passed between you?

A. December 31, this year.

Q. With regard to other Unions signature to this contract, you say that except for four, they have entered into other separate contracts or into another single contract?

A. I don't get the difference.

Q. Well, have they jointly signed the same——

A. (Interrupting): Oh, no.

Q. (Continuing): ——another document, or has the A. G. C., Seattle Chapter, entered into a series of different agreements, and separate agreements, with the other Unions?

A. That is correct. Separate agreements.

Q. Have those agreements now been executed?

(Testimony of Colton D. Harper.)

A. Some of them have and some of them will be executed the first of the coming year. [11]

Q. Is there in the language of any of these other agreements this language of Section 9 of the existing agreement?

A. Not as it is there written. There is a hiring clause in these other agreements, but not worded as it is here.

Q. It is not in the language that appears here?

A. No.

Q. The A. G. C. has been the bargaining representative in behalf of the employers with the various building trade Unions in the Seattle area for what period of time?

A. Since, roughly, 1923. * * * * * [12]

Q. (By Mr. Boyd): Your Chapter in practice, does it not, receives plans and specifications for proposed construction in the Pacific northwest and in Alaska?

A. That is correct.

Q. That is a regular service that the Chapter offers?

A. Yes.

Q. By virtue of that service which you are offering, do you have opportunity to know what of these contracts are let, construction contracts are let, to your own membership?

A. Anything that I might tell you would be a pure guess. We have no, we have never run a tabulation on it or anything to determine the percentage.

Q. Well, I do not want to guess in this record, but do you not in regular practice circularize your

(Testimony of Colton D. Harper.)

own membership to inform them to whom the contracts have been let? A. Oh, yes.

Q. And that would include not only bidders who were not members of your organization, but bidders who were members of your organization?

A. Correct.

Q. I appreciate that you cannot recall all of these contracts that have been let in the last year, but do you have sufficient knowledge so that you can give an informed opinion, state an informed opinion, that among your members, and exclusive of the Respondent, Shuck Company, there has been let to them contracts [13] totaling, in contract price, more than fifty thousand, for work that was to be done on shipping terminals along the coast of Washington, and particularly in Seattle, shipping wharves, and steamship company facilities?

A. On every one except the steamship company facilities I can say yes.

Q. That is, there has been more than fifty thousand worth of work done for shipping terminals, that are used in loading of ocean-going vessels?

A. Correct.

Q. And wharves? A. Correct.

Q. In addition to that, and apart from that, do you know whether members of your organization, apart from the Shuck Company, have performed work for the port of Seattle? A. Yes.

Q. And do you know that members of your organization, apart from the Shuck Company, in the past year would have performed work in excess of

(Testimony of Colton D. Harper.)

fifty thousand for the port of Seattle? A. Yes.

Q. Now, apart from that, is it true, is it not true that members of your organization, apart from the Shuck Company, have performed work under construction contracts where the contract price was, in total, exceeded fifty thousand, for employers or for companies, for owners, property owners, who were engaged in [14] producing goods that are shipped in interstate commerce? Libby, McNeill & Libby, for example, or any number of the great manufacturers in the northwest.

A. I would say yes.

Q. And the amount of goods which those companies ship in commerce, it would be your informed opinion that that exceeds more than twenty five thousand a year? A. Yes.

Q. With regard to the port of Seattle, in the matter of your own knowledge, it is the public corporation that operates the free port at Seattle, and in addition to that, the International Airport at Seattle-Tacoma International Airport, is that not correct? A. Yes.

Q. In addition to operating the International Airport and the free port of Seattle, is it a matter of knowledge to you that it operates, that it owns and leases facilities, or terminals, for the trans-shipment of goods, and in addition to that, for the storage of goods awaiting shipment? A. Correct.

Mr. Boyd: I have no further questions of Mr. Harper.

(Testimony of Colton D. Harper.)

Cross Examination

Q. (By Mr. Iversen): Mr. Harper, was there a previous contract with these same labor organizations negotiated by the A. G. C.?

A. Excuse me. I don't know the exact date all the way back, [15] but the most recent one, and the furtherest one back that we have of copy of, is dated, I think, in October of 1940.

Q. Do you recall whether or not that had a clause in it similar to Section 9 of the present contract?

A. It's almost identical.

* * * * *

Mr. Iversen: I propose to offer a contract dated August 13, 1940 containing a Paragraph 9, which reads as follows: "A. It is further agreed that all members of the party of the first part hiring employees will employ none other than members of the party of the second part, as enumerated in schedule attached hereto, entitled 'Wage Scale'".

* * * * *

Mr. Iversen: "B. The party of the second part agrees that it will require all employers, whether parties of the first part or not, to meet the conditions of Section 7, 8 and 9 of this agreement, and further to register and comply with the state workers Compensation Tax Act, the State Business and Occupation Tax Act, the State and Federal Social Security Acts, and the [16] State Unemployment Tax Act, before the party of the second part will furnish men to such employer. It shall be the responsibility of the party of the second part, to the best

(Testimony of Colton D. Harper.)

of its ability, to enforce a Union condition on all the construction within the jurisdiction of said part"——

Mr. Boyd: (Interrupting) Party.

Mr. Iversen: It reads "part" here. The "y" must have been dropped.

(Continuing) ——"as defined in Paragraph 3." [17]

* * * * *

Mr. Iversen: My proposal was to offer this for the stipulation, in lieu of the introduction in evidence of the document.

Mr. Boyd: I will concur in a stipulation that the matters read into the record shall be received in evidence, evidencing [19] the agreement that had been entered into, effective October 10 of 1940.

Trial Examiner Royster: Is that agreeable?

(No response.)

Trial Examiner Royster: The stipulation is noted.

Q. (By Mr. Iversen): Mr. Harper, was that agreement entered into in October 1940 continuously in effect from that time until the amendment that has been introduced into evidence, introduced in 1950?

A. It was in continuous effect, with the exception of some minor addenda that have been added to it relative to wage increases and minor pay items. [20]

* * * * *

Q. Did the Seattle Council act as your negotiating agent on behalf of the industry?

(Testimony of Colton D. Harper.)

A. The Seattle Construction Council?

Q. Yes. A. Yes.

* * * * *

Q. (By Mr. Iversen): What is the relationship between the Seattle Council, the Seattle Construction Council, and its member organizations, with respect to these, to the negotiation of these agreements? Just what authority does it have?

A. Do you mean now, the relationship between the Seattle Construction Council and the A. G. C.?

Q. No. The relationship between the Seattle Construction Council, as a negotiating agency, and its members. Just what authority does the Seattle Construction Council have?

A. The Seattle Construction Council negotiates these agreements for and on behalf of its membership, and also the Seattle Chapter of the A. G. C.

Q. And are they bound, are the members bound, by the agreements as negotiated? [21]

A. Yes, they are.

* * * * *

Mr. Boyd: Mr. Buchanan is called under Rule 43 (b).

ROBERT BUCHANAN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination [22]

Q. (By Mr. Boyd): Your name, sir?

A. Robert Buchanan.

(Testimony of Robert Buchanan.)

Q. And your employment?

A. I am the Secretary of the Building Laborers' Union, Local 242.

Q. Do you also serve as the business agent of the Local?

A. That is correct.

Q. Were you serving as the business agent of the Local during July of 1953?

A. Yes.

Q. Were there other business agents of the Local?

A. One assistant, yes. Mr. Wood.

Q. You say Mr. Wood. Russell Wood?

A. That is correct.

Q. His full name is Elmer Russell Wood?

A. That is correct.

Q. But he is commonly known as "Red"?

A. That is right.

Q. Where were your offices at that time, Mr. Buchanan?

A. 2800 First Avenue, in the Labor Terminal.

Q. Did you have working in that office another officer of the Local?

A. Yes. Mr. Shannon. Hubert Shannon.

Q. What was his position?

A. He was the corresponding secretary and labor dispatcher. [23] Was that in July?

Q. In July.

A. No. Mr. Shannon resigned on the 29th of June.

Q. Mr. Allman?

A. Mr. Allman, that is correct. Mr. Shannon resigned on the last day of June.

(Testimony of Robert Buchanan.)

Q. Mr. Allman's first name is what?

A. Leo.

Q. And he was the corresponding secretary and served as the dispatcher? A. That is correct.

Q. You shared the same office space, did you not?

A. We have only one office, yes.

Q. The office is so arranged that you have a counter, behind which Mr. Shannon served as the dispatcher? A. That is right.

Q. Your desk was located behind the counter?

A. Yes.

Q. Your Union, Local 242, is signatory to this contract in evidence, General Counsel's Exhibit No. 2? A. That is correct.

Q. You are familiar with the hiring practices that are followed under the contract, are you not?

A. Yes.

Q. With regard to those hiring practices under the contract, [24] what has been the practice of Shuck Construction Company in the matter of securing common laborers or hod carriers, building laborers, members of your union?

A. They make a call for men when they are required, as a matter of practice, when they need men they call for them.

Q. What is your practice in the matter of dispatching men, when you are called for men?

A. Let me get this straight. You mean the method they are sent out on?

Q. Yes. What method do you follow in determining who should be sent out?

(Testimony of Robert Buchanan.)

A. When the members get out of work they register, and we try and send the man out first who is registered the longest.

Q. The first man in is the first man out, is that your practice? The first man registered is the first man to be dispatched, normally?

A. We separate the men between laborers, hod carriers and brick men. They are segregated. Providing they are qualified.

Q. What men register there, then? Who registers at your office?

A. The members of the organization.

Q. The members of your organization?

A. That is correct.

Q. Do you carry a register for non-members of your organization? [25]

A. Well, if some non-member goes out, we keep a record of him. But we don't keep a full record, unless he goes to work, but if we send a non-member to work, we just keep a record of where he goes to work. Maybe a hundred a day come in there.

Q. Under what circumstance, in practice, do you send a non-member out to a job?

A. On a temporary permit for a week or ten days, to see if he qualifies, if he likes the job, temporarily.

Q. Do I understand that it is your practice, where a non-member comes in, you let him register, or is it that you just put down his name on a slip of paper?

A. No. It depends on the employment situation.

(Testimony of Robert Buchanan.)

If the employment situation is good, we have many come down in the morning and we generally try to send him along with some of the other members out to work.

Q. If the employment situation is not good, is there any preference given between the members and non-members?

A. Oh, preference to the members, yes.

Q. You would dispatch only the members first, so long as there are jobs to be filled, you would dispatch your members?

A. First, and then afterwards the non-members or people who have traveled in here, who don't belong to the organization.

Q. Do you carry non-members' names for a specific period of time in your office?

A. Yes. We have these dispatch slips. We carry them for [26] about a year.

Q. Having made out a dispatch slip, and having dispatched a non-member, you keep a copy of that?

A. Yes.

Q. But, insofar as keeping any register of those members, do you keep any register of non-members for any period of time?

A. No, we don't.

Q. So, as I understand the substance of your testimony, if a non-member comes in, and if he is looking for a job, you would put down his name, and in the event that you had no member to dispatch to that job, would you then dispatch the non-member?

A. That is correct. Whatever number they might be.

(Testimony of Robert Buchanan.)

Q. You make out a dispatch slip for him and keep your copy of that dispatch slip?

A. We keep a duplicate, yes.

Q. Now, with respect to dispatching people to Shuck Construction Company, is this the procedure that you have followed? A. That is correct.

Q. You referred to dispatching non-members on a permit.

A. A temporary slip, a temporary permit slip, yes.

Q. Is that something apart from the dispatching slip? A. Yes.

Q. You give him a permit, then?

A. That is right.

Q. What is the fee that is charged for a permit? [27]

A. Nothing for the first ten days. To see if the people really can qualify, we give them a ten-day period to find out.

Q. That is, the permit recognizes, that is an acknowledgment that he has passed through your hall and permits him to continue working there for a period of ten days? A. Yes.

Q. At the end of ten days, what is required then?

A. He must then apply for membership.

Q. What is the membership fee, or the initiation fee? A. \$27.00.

Q. And is there a monthly membership fee apart from that? A. \$1.50 dues, yes.

Q. Dollar and a half dues? A. Yes.

(Testimony of Robert Buchanan.)

Q. So such a person, who had been employed for ten days, would then be required to come in and pay up his initiation fee of \$27.00?

A. Oh, no. He gets 30 days to pay that in.

Q. He has 30 days in which to pay that?

A. Yes.

Q. But you require him to make his application, though, at the end of ten days?

A. That is correct. [28]

* * * * *

Q. Did you have any occasion to talk to Richard Kieburtz, this young man seated on my left? (Indicating.)

A. I remember him being only once in there, I believe I remember him being in there once.

Q. Can you recall when he was in there?

A. It was during school vacation, when the students——

Q. (Interrupting) You have no recollection of the date? A. Not the exact date, no.

Q. But you do remember the occasion?

A. Yes, I remember it.

Q. Will you tell us as best you recall, what passed between you and—did you talk to him at that time?

A. I guess he talked to Mr. Allman, and then he finally talked to me, I think it was. He had been in there previously. He came into the office, I think. I am not certain on that.

Q. Did you say that he was in there once before the time when he talked with you?

(Testimony of Robert Buchanan.)

A. No. I believe it was the same particular day, but I wasn't in the office. I probably wasn't in there.

Q. Oh, I see. In other words, you were not present when he came in on any previous occasion? [29]

A. No, I was not. That is right.

Q. But you understood that he had been in on a previous occasion? A. No.

Q. Then I misunderstood your testimony.

A. No. I might have been in the building, but I wasn't in the office when he came in on that particular day. But I think it all occurred on the same particular day, to my knowledge, any interview we had with Mr. Kieburtz——

Q. (Interrupting) It all took place on the same day, so far as you know?

A. As far as I am concerned, that is correct.

Q. Did you ever hear any conversation passing between Mr. Kieburtz and Mr. Allman, the dispatcher? A. No, I did not.

Q. Did you personally talk with Mr. Kieburtz?

A. Yes.

Q. Will you relate to us, please, what you recall of your conversation with Mr. Kieburtz?

A. Well, he said that he wanted to get a permit to go to work, and I asked him who he was going to work for.

Q. And what would be the significance of that?

A. Well, we keep a record of people going to work, for whom they go to work, yeah.

Q. And then what? [30]

(Testimony of Robert Buchanan.)

A. I believe he told me it was none of my business.

Q. You mean, he used that expression?

A. Well, in effect, yes.

Q. What did you say?

A. I said to him, "You had better have the contractor who you are going to work for call us up, and then we will know where you are going to work."

Q. Why would you tell him that under those circumstances?

A. We like to keep track of where people go, and if the contractors call up for some certain individual, like especially during the school vacation, some students, we try and clear these students, someone to the contractor's liking, under the fact that the students aren't always very well qualified as laborers.

Q. Having made that remark to him, that he should have the contractor call you up and tell you that he was going to hire him, what response did he make to that?

A. He said he didn't have to.

Q. Then what did you say in response to that?

A. I didn't say anything. I didn't say anything much to him. [31]

* * * * *

Q. Did you not explain to Mr. Kieburtz that, when you said to him that the contractor should call you, did you not explain to him that the labor contract required the contractors to call you?

A. No, I didn't explain that. [32]

Q. Well, it's true, is it not, that the collective

(Testimony of Robert Buchanan.)

bargaining agreement does require the contractors to call you, for the dispatch of men?

A. Yes, but they don't all do it.

Q. But you have endeavored to require them to do it, have you not?

A. Yes, that is correct.

Q. To live up to their contract, which is understandable?

A. Yes. They do call us and say put someone to work, and if they can qualify they can become members of the organization. The contractors would like us to take them in as members of the organization.

Q. Did you issue a permit to Mr. Kieburtz?

A. Not that I know of, no. I am not positive on that. I didn't personally, no, I didn't.

Q. And that was what he came in to ask for?

A. Yes.

Mr. Boyd: That is all. Thank you, Mr. Buchanan.

Cross Examination

Q. (By Mr. Jackson): Mr. Buchanan, how long has the Shuck Construction Company been drawing men or getting men through the Union?

A. Oh, since, ever since they started to open business. It must be, oh, ten or fifteen year ago since Mr. Shuck went in business for himself. [33]

Q. What has been the relationship between the Union and the Shuck Construction Company with reference to hiring young men that are out of school during vacation periods, in past years?

A. Oh, there has been quite a few favors

(Testimony of Robert Buchanan.)

granted to Mr. Shuck, along with the rest of the contractors.

Q. Is that a practice that has been followed by the Union, to give permits to the boys coming out of school at the vacation periods, so they can go to work on jobs? A. That is correct.

Q. On jobs?

A. They don't have to become members of the organization. They have what we call a school permit, which costs them \$5.00, and that does them for the vacation period.

Q. Would you explain that? What is the difference between the school permit and the temporary permit?

A. The temporary permit is issued to someone who is eventually going to join the organization or just continue working, but this is for, the school permit is for, the boys who are going to work for the duration of the summer. And they have the privilege to join if they wish to.

Q. In 1953, during the period when Mr. Kiebertz here came down to see you, how many permits were given to boys coming out of the school, to go to work during this past summer?

A. Well, there were quite a, there were quite a number. I couldn't say exactly. But much less [34] than there had been in years previous, under the fact that the work situation had changed differently this summer, but to give you an accurate account, there were probably anywhere from 15 to 25 students working this summer.

(Testimony of Robert Buchanan.)

Q. And they were all working on the school permit? A. That is correct.

Q. School permit?

A. What they call student's permits.

Q. Student permit? A. Yes.

Q. In those cases, do those boys, do they generally have a job, do they tell you that they have got a job with some contractor and for you to give them a permit?

A. They mostly go to the contractor first, yes.

Q. And the contractor calls in and says he would like to put a boy to work? A. Yes.

Q. And then you arrange a permit for him?

A. We tell him to work him for ten days and see how he turns out, in case that he just don't fill the bill.

Q. And if he fills the bill satisfactorily to the employer, he just continues on, then, for the vacation season? A. That is correct.

Q. Generally what period is that from?

A. Well, it would be from July up until September, and then [35] the University boys continue on until the middle of October, I guess it is, or the first week in October. [36]

* * * * *

Q. Mr. Buchanan, you were here this morning when the stipulation was made with reference to the contract that was negotiated between the Associated General Contractors and the Building Trades Council, which has been referred to as dated

(Testimony of Robert Buchanan.)

August 13, 1940. At that time were you the secretary and business agent of Local 242?

A. That is correct.

Q. And did your organization participate [38] in that, in the negotiations and signing of the contract dated August 13, 1940?

A. Yes. It was under a different regulation at that particular time. It was a building trades contract, with all trades in the one agreement. Everybody, all the various trades was in. That was negotiated by a committee of five, elected by the Building Trades Council to negotiate the agreements.

Q. And your organization was a signatory to that contract?

A. Yes, I was one of the negotiators on there.

Q. You were——

A. (Interrupting) I participated for the building trades. I was on there.

Q. That is, you were one of the members representing the labor groups in negotiating that contract? A. That is correct.

Q. And your Union, Local 242, was a signatory to that contract? A. That is correct.

Q. August 13, 1940? A. Yes.

Q. Prior to 1940 did your Union and the other trade Unions, that is, building trade unions, have contracts with the Associated General Contractors?

A. Yes, sir. The first contract, I believe, was 1925.

Q. And this clause that is referred to, and was read into the record this morning, from the con-

(Testimony of Robert Buchanan.)

tract of August 13, 1940, with reference to the employers drawing men through the Union, [39] has that clause always been in the contract?

A. Yes. Words to that effect, yes. Probably not the exact wording, but it meant the same.

Q. In other words, since 1925 the employers have drawn their labor through the Unions?

A. That is correct.

Q. And that has been a practice that has been followed since 1925, to your knowledge?

A. That is right. That is correct. [40]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Boyd): With the student permit, is that effective for only ten days?

A. No. That is, he has to make up his mind in ten days, the contractor, whether he is going to continue his employment.

Q. But at the end of ten days, the student, he then pays the \$5.00? A. That is correct.

Q. With reference to the non-student, you give a man who is not a member, then, a permit under some situations?

A. Almost the same situation.

Q. Is that effective for only ten days?

A. Yes, and then he comes in and starts paying on his——

Q. (Interrupting) The \$27.00 membership fee?

A. No, starts putting the money down on it. They generally get a months' time. [49]

Q. He puts something down right then?

(Testimony of Robert Buchanan.)

A. Yes. And then—it's generally 40 days' time we give them.

Q. Do I understand from your answer, then, that you would not be dispatching any man, a student or a mature man, you would not be dispatching him unless he had a permit, a ten day student permit or a working permit?

A. We would have a slip that he had cleared through the office, in order to satisfy the other man.

Q. That is the function of the dispatching slip?

A. Yes.

Q. What is the function of the slip?

A. In case there is a single handed job, in case some of the other trades ask him if he was cleared through the organization, probably, on residence work, there would probably be only one man on residence work, and probably some plumber or brick layer would ask him——

Q. (Interrupting) And that would show them that he had been cleared by, and was acceptable to that extent, by your Local 242?

A. That is correct.

Q. And it would also show the function, of showing the business agent, who might visit the job, that he had cleared through the hiring hall?

A. That he had visited the office, that is correct.

Q. There have been instances, have there [50] not, when contractors have called you personally as the business agent of the Union, saying that they had a man who was wanting to go to work,

(Testimony of Robert Buchanan.)

could they put him to work, and you have told them that they would have to be sent down to the Union hall before being put to work?

A. Send him down to get his clearance, yes. We send him down to get a dispatch slip, yes. [51]

* * * * *

Mr. Boyd: Mr. E. F. Shuck, called under Rule 43 (b).

* * * * *

EUGENE F. SHUCK, JR.

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): Your name, please?

A. Eugene F. Shuck, Jr.

Q. What is your employment, Mr. Shuck?

A. Well, general contractor.

Q. Well, you are connected with what company?

A. With the E. F. Shuck Construction Company. I am vice-president and secretary of the corporation.

Q. What part do you have in the practical operations of the corporation?

A. Oh, office and field supervision, as well as the handling of estimates and contracting.

Q. With reference to your organization, your field organization, do you have a general superintendent? A. Yes, we do.

Q. And his name is what?

(Testimony of Eugene F. Shuck, Jr.)

A. Louis Benson.

Q. Did you have in July a job superintendent on the Mercer Island school? A. Yes.

Q. And his name was what?

A. Everett Sayler.

Q. In addition to him, did you have a labor foreman employed on that job in the latter part of July? A. Yes, sir.

Q. And his name was what? [53]

A. Chester Tucker.

Q. How long, incidentally, had Mr. Tucker been in your employ at the end of July? Or we will put it in this way: When did he start in your employ, to the best of your recollection?

A. Let's see. I would say that would be about the first of June. I don't remember the exact date. He came to work over there shortly after the job started.

Q. That was the first instance of him working for you? A. Yes, sir.

Q. Can you fix it in relation to the time when Richard Kieburztz worked on the job, when it was that Tucker was employed on the job?

A. Well, he was there during his——

Q. (Interrupting) While Tucker was employed?

A. Yes.

Q. How long before Kieburztz' employment was it that Tucker had first been employed? I am trying to relate it to an event, if you can't recall the date.

A. Well, the latter part of June and first of July, and Tucker was there as of the first of June.

(Testimony of Eugene F. Shuck, Jr.)

Q. I believe our record will establish that Kie-burtz was there on the last three days in July, so is it your recollection that Tucker came there, now, the first of July?

A. No. He was there before the first of July.

Q. You think he was there before the first of July. Very well. [54] Incidentally, have you ever had any conversation with Mr. Kieburtz?

A. He was in, yes, he was in the office.

Q. Do you recall when that occurred?

(No response.)

Q. Was it before or after his employment?

A. He was in before his employment. He came in and asked for Mr. Benson.

Q. Yes?

A. At which time, as I recall, Lou was not in. And we try to funnel all of our men through Mr. Benson.

Q. Did you talk with Kieburtz on that occasion?

A. That was the substance of our conversation at that time.

* * * * *

Q. Let's go to matters that are alleged as your operations affecting commerce.

Mr. Boyd: Not to the legal conclusion as [55] such, Mr. Croson, but you may wish to make a statement concerning your denial of Paragraph VI and then such further statement as you desire to make, concerning the allegations admitted, or rather denied, in Paragraph IV.

Mr. Croson: Very well. I admit the allegations

(Testimony of Eugene F. Shuck, Jr.)

as set forth in Paragraph IV, the factual matter, and we deny the Paragraph VI, which, I think, is a conclusion of law. We reserve the legal question, in other words.

Trial Examiner Royster: So you want your answer to be considered as amended in accordance with that statement?

Mr. Croson: Yes.

Trial Examiner Royster: Very well. There is no objection to the amendment, I take it.

Mr. Boyd: Certainly not. And in order that it may be specific, because I see that Paragraph IV could be construed two ways.

Would you not, in fact, admit, Mr. Croson, that the respondent employer, Shuck, did construction work valued in excess of fifty thousand for the port of Seattle in 1952, and apart from that did other construction work valued in excess of fifty thousand for employers who themselves produced goods valued in excess of twenty five thousand that were delivered outside of the state of Washington, all done in 1952?

Mr. Croson: We so stipulate.

Trial Examiner Royster: Very well. [56]

Q. (By Mr. Boyd): Mr. Shuck, does your company have any agreement with the Common Laborers' Union other than the document that is in evidence as General Counsel's Exhibit No. 2?

A. I know of none, no.

Q. That is the only agreement that has con-

(Testimony of Eugene F. Shuck, Jr.)

trolled your dealings with the Common Laborers' Union, Local 242? A. That is correct.

Q. Is that correct? A. That is right, sir.

Q. And it was, it was in effect, and your company recognized it as being in effect as of July 1953, July of this year? A. Yes. [57]

* * * * *

Q. When did Sayler inform you that Kieburtz was not a satisfactory worker?

A. That would be, as I recall, after he was let go.

Q. After he was let go? A. Yes.

Q. It was not discussed with you before he was let go? [61]

A. No. I don't follow up on those. I leave those up to the superintendent on the job. He is responsible for his men out there.

Q. As a matter of fact, Mr. Shuck, at the time when Kieburtz came in and told you that he had made his, filed his charge with the Labor Board, you then didn't know that he had been discharged, did you?

A. Yes, I knew that he had been discharged.

Q. When did you learn it?

A. Well, let's see. That would be on the Friday night that he was let go.

Q. Who reported it to you? A. No one.

Q. How did you happen to know that he was discharged that night?

A. Well, due to the fact that the way the checks were paid up when they were sent out.

(Testimony of Eugene F. Shuck, Jr.)

Q. Did you make up the checks?

A. Not the one that terminated his employment.

Q. How did you learn—how did you learn that his employment had been terminated?

A. We hire and fire all the time, depending on the need. I don't pay any attention to these men—

Q. (Interrupting) I am asking you what you know of Kieburtz' discharge. [62]

A. As I say, on a Friday night, our week ends on a Wednesday, we pay on a Friday.

Q. Yes?

A. And any time a man gets two checks on Friday, I know that for some reason or other he was let go.

Q. How did you know that he got two checks on Friday?

A. Through the bookkeeper. The bookkeeper makes the checks out.

Q. That is as I understand it. But if the bookkeeper makes out the checks, how did you know that Kieburtz got two checks on Friday?

A. That is the only reason I would know.

Q. Do you mean that the bookkeeper told you—

A. (Interrupting) I see all checks before they go out.

Q. Did you see Kieburtz' checks before Friday night?

A. It would be Friday night or Friday morning.

Q. Did you see Kieburtz' checks when they were made up?

(Testimony of Eugene F. Shuck, Jr.)

A. His check, the second check, I would say that, should say, in making it up, yes. The actual check I would say no. His weekly check I signed. But this check that released him, my father signed because I was not in the office at the time those checks went out. [63]

* * * * *

Q. And was Everett Sayler your only informant for the reason of the discharge for Kieburztz?

A. Everett was the first one I talked to, as I recall. Everett was the first one. Because I was surprised when he walked in with that thought in mind. It was all new to me, and immediately I contacted Everett and wanted to know what the deal was.

Q. That is when you found out the circumstances of his discharge, is it not? A. Yes.

Q. Then, the occasion for discharging the man was not because you were through pouring the cement, but it was because you didn't want him on the job, according to your account.

* * * * *

A. As far as the concrete being poured, we pour batches of concrete off and on. Maybe we will pour one batch on Monday and another batch on Wednesday. But in this particular case, I guess it was on a Wednesday or Thursday that they poured this batch of concrete, and if the man can get in and produce, and you have got work for him, you like to hang on to them.

(Testimony of Eugene F. Shuck, Jr.)

Q. How long did it take to pour the batch of concrete? [66] A. I don't know.

Q. You do know that other batches of concrete were poured on the same job site after that batch?

A. Oh, yes.

Q. You were just beginning to pour your footings at the time this young man was employed there, isn't that true?

A. No. On this particular building, on the administration building.

Q. When you say this particular building, you had the contract to construct more than the administration building, did you not?

A. Well, the whole project.

Q. And the whole project encompassed how many buildings? A. Yes.

Q. And they were identified as what?

A. As your covered play shed, as your classrooms, and the administration building.

Q. So the footings for all three of these buildings were to be poured in the course of your construction work? A. Yes. [67]

* * * * *

Mr. Boyd: In view of the last witness' answers, I would call under the same rule, 43 (b), Everett Sayler, the job superintendent.

EVERETT SAYLER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination [68]

Q. (By Mr. Boyd): You will state your name, please. A. Everett Sayler.

Q. And what is your employment, Mr. Sayler?

A. What?

Q. Your employment? By whom are you employed and in what capacity?

A. By the Shuck Construction Company, as superintendent.

Q. Are you a general superintendent or a job superintendent? A. I am a job superintendent.

Q. Were you so employed in July of 1953?

A. About that time, yes.

Q. Were you so employed on the Mercer Island school construction job? A. That is right.

Q. At the outset, Mr. Sayler, tell us the nature of that job, that is, how much of a construction job it was in terms of the number of buildings involved, the size of the area, and the stage of construction in the latter part of July.

A. Well, there's three buildings there and a complete sewage system, sewerage system, quite a large play shed, and I think there is ten acres in the tract. There is one class room, administration building, and an all purpose building, and then the boiler room.

(Testimony of Everett Sayler.)

Q. What was the stage of progress on the construction job in the latter part of July, and I am referring specifically to the [69] time when Kie-burtz was employed there?

A. We were pouring footings on the class room at that time.

Q. Had you yet poured the footings on the administration building? A. No.

Q. Or had you yet poured the footings on the play building? Was that it?

A. Yes. No, we hadn't.

Q. Was it a play building or a gymnasium?

A. Play court.

Q. That is a covered court? A. Yes.

Q. Would it have sides on it as well?

A. No.

Q. Were there footings for the play court?

A. Yes, there were.

Q. Was there separately a gymnasium?

A. Well, it's a multi-purpose building. It's not a gymnasium. It's a multi-purpose building.

Q. Well, the multi-purpose building that you are now referring to, is that the same, the play court?

A. No.

Q. That is a separate building? A. Yes.

Q. Is that separate from the administration building? [70]

A. Yes. They are the, the two are together, but it's a separate part. The two are in conjunction

(Testimony of Everett Sayler.)

with each other, that is, the ends come right together.

Q. In addition to that, then, there was a class room? A. Yes.

Q. Covering these structures, upon what building did you pour the first footings?

A. On the class room building.

Q. And that was the pouring that you were doing at about the end of July?

A. I don't remember the dates. I have the dates when it was poured, but I don't have them in my mind right now. That was the first one, and that was about the time.

Q. Over what period of time after that were you engaged in pouring the footings for these several buildings?

A. Well, some of them were delayed quite awhile. It would be hard to say. Our first purpose was to get the class room done.

Q. Now, you have general authority, do you, to hire and fire? A. That is right.

Q. And you exercised that authority?

A. I haven't yet.

Q. What?

A. I haven't had to. I don't make a practice of hiring, or, that is, firing. When I want to get a man that is insufficient to do his job off of the job, then we lay him off. [71]

Q. Do you recall the circumstances of Richard Kieburts seeking employment there? A. Yes.

(Testimony of Everett Sayler.)

Q. Will you relate to the trial examiner as best you can recall, when it was he first sought employment and what occurred?

A. Well, I can't remember the date when he came. He came on the job and begged me for a job. He said he was trying to go to school, and I can't remember, he had quite a story. He wanted to get a job. I felt sorry for the boy and I told him I didn't have work for him then, but I referred him to the office, that he might put in an application for work down there. Then, oh, it went along a week or so, and through a mistake we got the wrong telephone number and got Kieburztz' number instead of another man that we wanted on the job.

Q. Did that mistake have anything to do with your discharge of Kieburztz? A. No.

Q. You do not attribute his discharge, then, to any mistake of employment? A. No.

Q. What was that mistake?

A. Well, just the wrong phone number, was all.

Q. Had you hired this other man on any previous occasion? A. No.

Q. What was it, then, that decided you to hire him instead of [72] Kieburztz?

A. Well, the other boy made a better appearance on the job to me. He looked like a man who could carry out the kind of work that I had.

Q. But you said he hadn't been working for you before?

A. Well, after you hire men for 35 years, you can tell by the looks of a man pretty well.

(Testimony of Everett Sayler.)

Q. This man's name was Lewis you are referring to? A. Yes.

Q. Bob Lewis? A. Yes.

Q. He was a University student? A. Yes.

Q. And actually, in relation to the time when Kieburztz first applied, when was it that Lewis applied? A. About the same time.

Q. Before or after?

A. I can't recall which one was there first. I don't remember.

Q. What was the circumstance — well, when Lewis came on the job, Lewis gave you his telephone number, didn't he? A. Yes.

Q. He left it with you? A. Yes.

Q. You told Kieburztz—you didn't take Kieburztz' telephone number, did you? [73]

A. I couldn't say for sure whether I did or not. I don't believe I did.

Q. Instead, you told him to get in touch with Lou Benson, didn't you? A. Yes.

Q. Lou Benson was the general superintendent and personnel manager? A. That is right.

Q. And Lou Benson had his principal office at the main office of the company?

A. That is right.

Q. You were working at the job site at Mercer Island? A. That is right.

Q. The main offices of the company are in the city of Seattle, aren't they? A. That is right.

Q. When was it that you were aware of the

(Testimony of Everett Sayler.)

mistake that was made in the matter of hiring Kie-burtz? When did you become aware of it?

A. When he appeared on the job.

Q. Do you recall your conversation with Kie-burtz when he came there the first time, when he first sought employment?

A. Nothing, only what I have told you.

Q. Mr. Sayler, my last question was, do you recall the conversations you had with Kie-burtz, particularly when he first came [74] there?

A. Just that he wanted a job, and he gave me a story that he wanted to go to school, and he wanted to make some money for that purpose. And I don't believe there was very much more conversation, if any.

Q. Any reference or inquiry concerning whether or not he belonged to the Union?

A. I think I asked him if he belonged to the Union, yes.

Q. Do you recall his answer?

A. He said no, he didn't, but that wouldn't be any trouble, he could handle that himself.

Q. And you say you did suggest to him at that time that he contact Mr. Benson? A. Yes.

Q. Did you at that time indicate to him that there might be a job for him later? A. Yes.

Q. At that time had Lewis applied for a job, Bob Lewis? A. I can't recall for sure.

Q. You say that you cannot recall the date of this first conversation? A. No, not exactly.

Q. The calendar date? A. No.

(Testimony of Everett Sayler.)

Q. Are you able to recall it in relation to the first time, [75] when he did start to work?

A. Well, it was a week or ten days anyway.

Q. Before that? A. Yes.

Q. Can you tell us the date on which he started to work?

A. Not without my time book, no.

Q. Will you please refer to your time book, or if it will refresh your recollection, is it not true that he started to work on July 29 of 1953?

Mr. Boyd: Make available to him, please, the time record.

Mr. Croson: Here.

The Witness: Thank you.

A. Yes, that is right.

Q. (By Mr. Boyd): And that was a Wednesday, was it not? A. Yes.

Q. Wednesday was the customary last day of your work week, of your pay week? A. Yes.

Q. Of your pay week? A. Yes.

Q. When you paid, you paid on what day in the week? A. We paid on Friday.

Q. And you paid, then, through Wednesday's work? A. That is right.

Q. Do you recall the circumstance of Kiebertz' [76] appearing for work that day?

A. All I can recall is that he came to work that morning.

Q. All right. Now, my question is between the time of the first conversation that you have testi-

(Testimony of Everett Sayler.)

fied to, and the occasion of him coming to work on that morning, the morning of the 29th, had you had any intervening conversations with him?

A. No.

Q. Did you on the morning of the 29th have any conversation with him?

A. I took his Social Security number and his name and got all the information from him, where he lived, his address and Social Security, and things like that, and then turned him over to his foreman.

Q. And to whom did you turn him over?

A. Chester Tucker.

Q. Tucker was the labor foreman?

A. That is right. [77]

* * * * *

Q. Do you know to what work he was assigned by Tucker?

A. It's pretty hard to remember that far back, but I think he was on the pick and shovel, that work.

Q. Did you personally assign him to the pick and shovel work? A. No.

Q. Did you personally observe his pick and shovel work? A. Yes.

Q. On what work did you observe his pick and shovel work that morning?

A. He was working right along side of me as I was running the instrument, shooting grades.

* * * * *

(Testimony of Everett Sayler.)

Q. What was the work that he was doing at that time?

A. He was supposed to be cleaning forms, back filling around forms, and cleaning them out.

Q. Forms for what? [78]

A. Concrete footings.

* * * * *

Q. This form is a small form, approximately two feet square? A. That is right. [79]

Q. It's nothing more than four pieces of sheet-rock rigged around a square, with supports on the outside? A. Yes.

Q. And he had been assigned to do what?

A. To clean off the forms and level out the bottoms and to back fill around the outside of them.

Q. And that was done preparatory to the pour?

A. Yes.

Q. The pour for the center of the building, these columns in the center of the building?

A. Yes.

Q. Was there any pouring going on at that time? A. Yes.

Q. Where was the pouring being done?

A. It was on the outside of the wall footings.

Q. That is, they were pouring the wall footings of the same building? A. Yes.

Q. At the time that he was engaged in doing this work?

A. We were pouring these other footings just as fast as they could be ready to pour.

(Testimony of Everett Sayler.)

Q. That is, he was working right ahead of the pour? A. That is right.

Q. Were these column footings poured on this same day? A. That is right. [80]

Q. Immediately after he accomplished his work?

A. Yes.

Q. Did he work alone on this?

A. I think there was one or two other boys working at it, too.

Q. Did you personally observe the work of Kie-burtz? A. That is right.

Q. What, if anything, did you observe concerning his work?

A. Well, I told him once how to do it, and the next time I got a chance to look at him, he still hadn't done anything I told him to. I went back and got down in the form myself and showed him how I wanted it done and he still didn't do it, and the architect came and bawled me out because the work wasn't done.

Q. What was it that you told him to do? Will you tell us, now, what it was you told him to do?

A. Well, I told him to pick out the big roots and chips out, and then to take a board and level the bottom of the form and take out all loose materials and level the form and have it clean, so that the concrete could be poured on a sound, clean bottom.

Q. Was that the extent of your first instructions to him?

A. Yes. After I showed him how to do it, I

(Testimony of Everett Sayler.)

gave him a board and showed him how to do it, as well as instructing him how to do it.

Q. Having done that, did he do it the way you informed him?

A. He never done it the way I informed him. I had to get [81] another man to finish it.

Q. Who was it that you got?

A. I can't recall. When you are pouring that way, you are busy and you have got to rush that stuff.

Q. Did you take Kieburtz off that work when you got the other man?

A. No. I left him shoveling dirt around there.

Q. For what purpose?

A. On the back fill, on the same forms.

Q. When you speak of the back fill, you are now talking about piling dirt around the outside of the sheetrock form in order to give it support, to hold the concrete when it's poured in, is that not right?

A. That is right.

Q. But you do not recall the name of the other man who was assigned to work along with him?

A. No, I don't.

Q. Do you know what the other man had been doing immediately before you called him to do this work?

A. No, I don't.

Q. Do you know what work he was returned to after he did the work that you had assigned initially to Kieburtz?

A. Well, when they run out of work like that

(Testimony of Everett Sayler.)

they go back to their foreman. They don't come to me.

Q. What was the circumstance, then, that occasioned you to be [82] the one to assign Kieburtz to this work when you had originally put him in charge of his foreman, Tucker?

A. Well, I didn't assign him to the job, but I did try to show him how to do it.

Q. Do you know whether Tucker had shown him how to do it?

A. I don't know if he did or not. Mr. Tucker was awfully busy that morning. Everybody was busy. When you are pouring concrete, everybody on the job is supposed to be busy.

Q. It is your clear recollection that this occurred on the occasion when you were pouring the concrete? A. Yes.

Q. And this was on the morning when he was employed? A. Yes.

Q. All right. How long did his work in doing this continue, in clearing the column footings?

A. Well, that was all cleared up and poured, I think, by about noon or a little after. I don't recollect how long we were on that.

Q. All right, then, to what was Kieburtz then assigned? A. I think back on some trenches.

Q. I beg your pardon?

A. I think he was back digging trenches. I am not sure, but I think he was put on with the rest of the gang on digging trenches for more footings.

(Testimony of Everett Sayler.)

Q. Was back digging on trenches, is that what you said? [83] A. Yes.

Q. These trenches were for what purpose?

A. For footings.

Q. They were the wall footings, then, is that right? A. Yes.

Q. What was the nature of his work in relation to the wall footings?

A. Pick and shovel work.

Q. Doing what, specifically?

A. Well, to dig the trench, take the pick and shovel and dig a trench so deep.

Q. That is what he was assigned to do?

A. Yes.

Q. Did you observe his work in that respect?

A. I did once or twice, yes.

Q. How was he accomplishing that work?

A. Very slow.

Q. So far as the correctness of the work that he was doing, how was it?

A. Well, he never, he never quite completed anything I don't think.

Q. Mr. Sayler, how long have you been with this company? A. On this job.

Q. Just on this job? Yes. [84]

Q. Now, as a matter of fact, you know that those trenches were dug by mechanical means originally, were they not? A. No.

Q. They were not mechanically dug?

A. The roughing out was done mechanically.

(Testimony of Everett Sayler.)

Q. And then these men were put in there to do some finishing up operation? A. Yes.

Q. It was not simply, then, a matter of digging the trench originally, but it was a matter of shaping up the trench?

A. Yes, that is right, taking out loose material.

Q. Did Kieburtz alone do this type of work?

A. Every man on the job did this type of work.

Q. That is, all the common laborers or people other than common laborers?

A. All the common laborers.

Q. Do you remember how many common laborers you had on the job at that time?

A. I could look here and see.

Q. Three, was it not?

A. I believe that is right.

Q. I will give you the names, Swatack, Root and Kieburtz.

A. Yes. There was Leonard Root and Sam Swatack and Richard Kieburtz on July 31.

Q. I am directing your testimony and your attention to the day [85] of July 29, the first day that he went to work there. What were the names of the laborers, common laborers, employed on that date?

A. That was Leonard Root, Sam Swatack and Richard Kieburtz.

Q. Were there any others employed on that date? A. Not common laborers.

Q. Will you look at the next following day,

(Testimony of Everett Sayler.)

which is July 30, and tell me how many common laborers were employed on that date?

A. Thirtieth. This was on a Saturday, wasn't it?

Q. I am referring to Thursday, July 30.

A. It would be the same three.

Q. Sam Swatack?

A. And Richard Kieburtz and Leonard Root. That's all, plus their foreman.

* * * * *

Q. (By Mr. Boyd): Did Kieburtz' foreman, Tucker, make any [86] observations to you concerning Kieburtz' work?

A. We discussed his inability to hold his job, yes.

Q. Did that take place on Wednesday, the first day of his employment?

A. Every day he was there.

Q. Specifically, what did Tucker say to you?

A. Well, he said he didn't seem to think, he didn't think he was following instructions like he should. And I didn't think he followed instructions either.

Q. And Wednesday was the last day of the pay week.

A. Yes.

Q. Did Kieburtz work on the next day, Thursday?

A. Yes. [87]

* * * * *

Q. (By Mr. Boyd): The last question to you was, to what work was he assigned on Thursday?

A. He worked on hand excavation and back fill.

(Testimony of Everett Saylor.)

Q. You have an original record there that was made during the course of work at that time, that you are making reference to? A. Yes.

Q. And when it refers to "hand excavation", to what type of hand excavation is that?

A. Hand excavation and back fill, six hours.

Q. Your record here shows, that you have referred to, that he put in two hours on hand excavation, and a total of six hours on back fill, is that right? A. Yes.

Q. This is on the second day of employment?

A. Yes.

Q. What was this hand excavation work?

A. It was on footings. [88]

Q. Were these wall or column footings?

A. I think they were wall footings.

Q. Upon what was the back fill?

A. That I don't recall.

Q. Do you have a similar work sheet for the preceding day? A. That would be the 31st?

Q. No, for the preceding day.

A. Oh, that's a time sheet there. Hand excavation.

Q. For how many hours? A. Eight hours.

Q. No back fill shown? A. No.

Q. Did he on the first day of his employment engage in this work that you have described, of excavating for the column footings?

A. He had the two that he had to work together, and it was all charged to the same.

(Testimony of Everett Sayler.)

Q. But your record shows that on the first day he was engaged eight hours in hand excavation.

A. Hand excavation and back fill.

Q. That is not your record, is it? Your record shows eight hours of hand excavation.

A. On this type of work it's all charged to the same thing.

Q. Why is it that you separated it on the second day and showed two hours in hand excavation and six hours in back fill? [89]

A. Well, because it was a different type of work.

Q. What was the difference, then, between the back filling on the second day and the back filling on the first day?

A. The first day he had to take out and put back in at the same time, it had to be all done in one operation in order to hold the forms together. On the other, the forms were wood and were all in, and were charged strictly to what they were.

Q. That is, what you are saying is that on the first day he had to take the dirt out and put it back in the same operation? A. Yes.

Q. And you call that hand excavation?

A. Yes.

Q. And on the second day he was just throwing dirt back in without taking any out, and you call that back fill, and that is a different operation?

A. Yes.

Q. What was he doing on the third day? What does your record show that he was doing on the

(Testimony of Everett Sayler.)

third day? This has reference to Friday, July 31.

A. Hand excavation.

Q. For how many hours? A. Eight hours.

Q. Did you observe his work at all on Friday when he was engaged in that hand excavation?

A. Yes, I did. [90]

* * * * *

Q. (By Mr. Boyd): What did you observe on the manner in which he was doing his work on Friday, July 31?

* * * * *

A. He went at it very slow and he moved around a good deal like a snail, I would say, and he didn't seem to have any ambition to get anything done. And he was way behind the other men on the same type of work.

Q. (By Mr. Boyd): Who were these men that he was way behind? A. Every man on the job.

Q. What men on the job? Name them specifically.

A. Swatack for one, Leonard Root for another.

Q. Were both of them doing identically the same type of work that he was doing?

A. Yes.

Q. You have a clear recollection of *the* personally?

A. They were all doing the same type of work.

Q. When you say all, you mean all three of them? [92] A. Yes.

Q. You are now saying in different words, that

(Testimony of Everett Sayler.)

he was slow. Is there anything else that you observed about his work?

* * * * *

A. Well, that is about all.

Q. (By Mr. Boyd): This was the same thing that you observed on the first day? A. Yes.

Q. Why didn't you discharge him on the first day?

A. Well, I like to give a man a chance. Maybe he could come out of it on the second day, after the first day. The first day on the job he has got to get used to instruction and supervision, and the first day you can't judge a man, really.

Q. Did you on that day decide to discharge him?

A. I was thinking about it very seriously.

Q. Had you reached a decision yet, that you would discharge him?

A. I did on the next day, before noon.

Q. You did on the following day, before noon?

A. Yes.

Q. What prompted you before noon on the second day to decide to discharge him?

A. Because he wouldn't do anything I told him to. [93]

Q. What did he do on the second day?

A. He was taking those forms out.

Q. You are now speaking of the column forms?

A. The column forms. I had made up my mind, that he didn't do what I told him to.

Q. Are you referring to the second day or the

(Testimony of Edward Sayler.)

first day? A. You have it in the record.

Q. You testified awhile ago that he was doing that on the first day. I want to know, was that on the first day or the second day?

A. Well, then is when I decided he wouldn't make the grade and I decided to give him another day or two to see what he could do.

Q. I am confused by your answer, Mr. Sayler. Perhaps I misunderstood you. I understood you to say just now that you were prompted to discharge the man who you observed the work that he failed to do, which you assigned him, in cleaning out the forms for the column footing.

A. That is right.

Q. On what day was he assigned to clean out the column footings?

A. I think that was the first day he worked.

Q. Then, do you say by noon of the first day he worked, you made up your mind to discharge him?

A. Not completely. [94]

Q. The first day was on the end of a work week, wasn't it? A. That is right. * * * * *

Q. (By Mr. Boyd): To be specific, only this, did you in the course of the first day, did anything further occur which in the course of the first day inclined you more to the decision to discharge him, in addition to your having observed his work on these footings during the morning hours?

A. I don't think so.

Q. So you did let him come back on the second day and work? A. Yes.

(Testimony of Everett Sayler.)

Q. Was his work improved on the second day?

A. No.

Q. Why was he not discharged at the end of the second day?

A. We decided to let him work the week out.

Q. And when you say "we did", who did?

A. His foreman and I.

Q. His foreman was Tucker?

A. And I also talked to Mr. Shuck about it. He said if the man wasn't competent to lay him off.

Q. You talked with what Mr. Shuck?

A. Mr. Shuck Senior.

Q. Did you talk to Mr. Shuck, Junior, about it?

A. No.

Q. But you say you did talk with Mr. Tucker, his own foreman?

A. Yes.

Q. Do you recall whether you talked with him on all three days, or was it only certain ones of these three days that you talked to Tucker about his competence?

A. It's pretty hard to recall that.

Q. And specifically, was your objection to the fact that he was a slow worker? Was that the objection?

A. Well, that and he wouldn't follow instructions.

Q. The failure to follow the instructions on this digging out the column footings?

A. Yes.

Q. Was there any other instruction that he failed to carry out?

A. Not that I recall at the moment.

(Testimony of Everett Sayler.)

Q. Now, he was not discharged until the evening of the 31st, is that right?

A. That is right.

Q. Did you talk with him on the evening of the 31st?

A. I don't recall. I don't believe I—I can't remember whether I talked to him or not. I don't think I did. [96]

Q. You have no recollection of any conversation with him? A. No.

Q. Do you recall that on the morning of the 31st, the business agent for the Hod Carriers' Local, namely Red Woods, came on the job?

A. He was there about noon, I think. [97]

* * * * *

Q. Bob Lewis, whom you referred to earlier in your testimony as being the one that was not employed when Kieburtz was mistakenly employed, was he later employed? A. Yes, he was.

Q. He was employed to replace Kieburtz after Kieburtz was discharged, was he not?

A. No necessarily. We needed another man at that time and it was a lapse of time in between.

Q. Well, Kieburtz was discharged on Friday evening and Lewis was hired on the following Wednesday, wasn't he?

A. I think so. Yes, that would be the following Wednesday.

Q. Lewis did produce a permit before he was put on the job, didn't he? A. Yes.

Q. By your arrangements, wasn't he?

(Testimony of Everett Sayler.)

A. No.

Q. Didn't you contact the Union and arrange for his permit?

A. No, I did not. [98]

* * * * *

Q. (By Mr. Boyd): My question of you now, Mr. Sayler, is did you not make an affidavit on August 25, before Mr. McFeely, concerning the facts of this case?

A. Yes.

Q. This document which you have in hand bears your signature, does it not?

A. Yes.

Q. And that is the affidavit which you made at that time, is that correct?

A. Yes. * * * * * [99]

Mr. Boyd: All right. It may be marked for identification. General Counsel's Exhibit No. 3. I will ask that this be marked for the purpose of further inquiry. [100]

* * * * *

Q. Now, I want to direct your attention to the third or fourth paragraph, being the paragraph at the bottom of the page, of this first page, and ask you to read that for the purpose of refreshing your recollection, if it will serve that purpose.

A. That is right. They called me by telephone and asked me if I had work for the boy.

Q. When you say "they called you", who called you?

A. The Union called me.

Q. The Union called you and asked you if you had work for whom?

A. For Bob Lewis.

Q. What did you tell the Union?

A. I told them that I did have.

(Testimony of Everett Sayler.)

Q. You told them that you did have?

A. Yes.

Q. Had he been to your construction job before that date, seeking a job?

A. Well, quite awhile before, yes.

Q. And, in fact, on this particular date, or at this particular time, that they were about to dispatch him out here, and before he was dispatched out he was at your job, too, wasn't he?

A. I believe he was.

Q. Yes. And that is what gives significance to this statement here, that I direct your attention to, that "I asked Local 242 of the Laborers' Union to let him have a permit to work until [101] school starts." Is that correct?

A. After they asked me if I had work for him, yes.

Q. Then you asked the Laborers' Local to give him a permit, is that right? A. Yes.

Q. Had he not been to the job site even before the Laborers' Local called you up? That is a question I asked you a few moments ago.

A. I think he was.

Q. Did you not send him down to the Local to get the permit? A. No.

Q. You did not? A. No.

Q. But you told him he would have to get the permit before he could work, didn't you?

A. I didn't tell him he had to, no. He went down on his own accord to get one when they called me,

(Testimony of Everett Sayler.)

if I had work for him. They asked me if I had work for him, and I don't remember how the conversation was. They stated they would give him a permit to come out.

Q. And he did produce a permit before he was assigned to work?

A. That is right. He got it of his own accord. [102]

* * * * *

Q. (By Mr. Boyd): Mr. Sayler, with reference to the statements made to you by Mr. Tucker concerning the work of Kieburtz, what specifically was the criticism, if any, that Tucker stated concerning Mr. Kieburtz' work?

A. Well, he was a good deal of the same opinion I was.

Q. I have asked you what Tucker stated?

A. You can't remember conversation that far back.

Q. Can you remember the substance of it?

A. The same things that has been stated.

Q. Did anything particularly happen on Friday that precipitated your decision on Friday to discharge him?

A. I don't remember anything specifically. My mind was pretty well made up by Thursday night, Thursday afternoon.

Q. What had occurred on Thursday, then, that had made up your mind?

(Testimony of Everett Sayler.)

A. Just watching him work. [103]

* * * * *

Q. Now, may I, for the sake of my own information, see the document that you were looking at, which showed the job as it was being worked on July 30, Thursday July 30?

A. Here. (Indicating.)

Q. You have provided that to me. Now, will you show me the page for July 29?

A. (Indicating.)

Q. Do you have the pages for July 29 and 30 in front of you? A. Yes.

Q. Will you not examine those two pages, and these are your original work records, are they not? At least, records, that you made at that time in the course of your doing, performing your work?

A. Yes.

Q. Is that correct? A. Yes.

Q. Will you not take a look at those two [105] records and then state to the trial examiner, on which day was it that the concrete was being poured on the job? Your record of July 30 shows that was the day on which concrete was being poured, doesn't it? A. Yes.

Q. And there was no concrete being poured on the next day, was there, the 31st?

A. I don't believe there was. No.

Q. So that the work records show that the concrete poured was on the second day, namely, on Thursday, July 30, is that correct? A. Yes.

* * * * *

RICHARD KIEBURTZ

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): Your name is Richard Kieburtz? A. Right.

Q. Where do you live?

A. 6314 Southeast Twenty eighth, Mercer Island.

Q. How old are you, Dick? [106]

A. Nineteen.

Q. What is your principal occupation now?

A. Student at the University of Washington.

Q. What department?

A. Electrical engineering.

Q. In the summer of 1953, this year, were you otherwise employed? A. Yes.

Q. That is, you were not in school at that time?

A. No.

Q. Were you, during the course of that summer, employed by Shuck Construction Company?

A. I was.

Q. And beginning on what date?

A. July 29.

Q. And that was what day in the week, as you recall? A. Wednesday.

Q. When did you make your first effort to gain that employment with the Shuck Construction Company?

A. On the preceding Thursday, July 23.

Q. July 23, the preceding Thursday?

(Testimony of Richard Kieburtz.)

A. Yes.

Q. Will you state, will you tell us now, what you did on July 23 concerning your getting employment at Shuck Construction?

A. I went to the school job on Mercer Island and contacted the [107] superintendent, Mr. Sayler, and asked him for work.

Q. Will you tell us in full your conversation with Mr. Sayler, as best you can recall it?

A. Well, I drove up to the job and Mr. Sayler and another man were looking over some plans in a little shed, so I walked up and asked for the superintendent, and Mr. Sayler turned around, and I told him that I was a University student and I wanted a job as a construction laborer, and that I had had previous experience. And the first thing he asked me was, did I have Union clearance. I told him I did not. And then he said that he didn't have anything right at the present time. He said that they had laid off a laborer a few days previously. I don't remember which day he said. And he said that they were going to take him on the following Monday. And he suggested that there might be something in a week or two, that I should come back. And he also suggested that I might talk to the personnel manager of the company, Lou Benson, down at their main office, and that he might have something for me on one of the other jobs, or maybe on that job.

Q. Was that the extent of your conversation with him, or was there more?

(Testimony of Richard Kieburtz.)

A. As best I remember, that was the extent of it.

Q. You say that you told him that you had had prior experience? Had you had? A. Yes. [108]

Q. In the summer of 1953 had you done any prior construction work?

A. Not in that same summer. In previous summers I had worked for Holly Hill Corporation.

Q. What type of work did you do for Holly Hill Corporation? A. Construction laborer.

Q. What type of construction was that?

A. An apartment building at Shelton, Washington.

Q. Was that the extent of your prior experience?

A. No. I had worked for Key West Builders, Incorporated, in Olympia, or rather in Tumwater.

Q. What type of work did you do there?

A. Construction laborer, in house construction.

Q. Had you had any other experience as a construction laborer?

A. I also helped my father build our house on Mercer Island.

Q. When did you do that?

A. Summer of 1952.

Q. What type of work did you do in that connection?

A. Construction laborer and carpenter.

Q. That is, you do some rough carpentry, too?

A. Yes.

Q. In your conversation, though, with Mr. Saylor, did you mention specifically this prior experi-

(Testimony of Richard Kieburtz.)

ence? I mean, did you specify what your prior experience had been?

A. I don't believe so. [109]

Q. Having talked with him, what did you do?

A. I left the job and went home and called up Mr. Benson.

Q. Did you get ahold of him?

A. Yes. I told him that I had talked with Mr. Sayler, I told him that I had talked with their superintendent on that job, and that he had suggested that I call him. And I told him that I was a University student and wanted the job for the summer, that I was not a member of the Union, and that I would take a job on any of their jobs that might be open. And he took my name, address and phone number, and he said that he would let me know if anything came in.

Q. Was that the extent of your telephone conversation with Benson?

A. I think so, yes. [110]

* * * * *

Q. Up to this time, had there been any occasion for your having a conversation with the respondent Union, Local 242?

A. Yes. I had attempted to get a permit from the Union.

Q. When did you do that? When did you make that attempt? A. On Wednesday, the 22nd.

Q. That is the preceding day? A. Yes.

Q. What was the circumstance that brought that about, Mr. Kieburtz?

(Testimony of Richard Kieburtz.)

A. Well, I had gone to look for a job as a construction laborer, and one of the places that I had gone was a restaurant construction job at the Mercer Island Shopping Center, and the superintendent on that job had asked me if I had Union clearance, and I said no, but I thought I could get it. So I went down to the Union that morning.

Q. To where did you go?

A. I went to their hiring hall and local office in the Labor Terminal.

Q. And that was on the morning of the preceding day? A. Yes.

Q. Do you recall with whom you talked down there?

A. I talked with the business manager.

Q. The man at the counter?

A. At the counter. [111]

Q. Do you recall your conversation with him?

A. Yes. I had asked him if I could get a permit to work for the summer. And he said no, that they weren't giving out any permits this summer because there were too many men unemployed who were members, and that they didn't give out permits unless most of those men were working. And then I asked him, well, could I join, become a member. And he said no, that they weren't accepting new members for the same reason, that they had too many men out of work. And I mentioned to him that I could get a job if I had a permit, but he said no, that, that summer, that there had been a lot of students in, and that they had refused them all, couldn't give any

(Testimony of Richard Kieburztz.)

of them permits because they had too many of their own men out of work. He said that the students that were working this summer were ones who had joined the Union the previous year, so they had, they had paid dues all year long, so they were members in good standing, but that they weren't giving out any permits or accepting any new members at that time.

Q. That was the extent of the conversation?

A. That was about it, yes.

Q. That was on Wednesday? A. Yes.

Q. Did you at any later time have any further conversations with anyone at the Union hall?

A. I did. [112]

Q. What brought that about? What prompted that?

A. On Friday I went back to the superintendent of this restaurant job and told him that the Union wouldn't give me clearance and asked if I could work there anyway. And he said that he'd rather try to, he said that he couldn't hire me if I wasn't a member of the Union, but that he would try to see if he couldn't get me a permit. And he said that he would have to talk to the business agent and for me to come back later, and he would call him. He said to come back that afternoon or the following Monday and he would call the business agent and find out.

Q. And?

A. And so I came back that afternoon and he hadn't called the business agent yet, but he called him at that time. He called Mr. Buchanan. And Mr.

(Testimony of Richard Kieburtz.)

Buchanan, he told me, he told me that Mr. Buchanan told him——

Mr. Croson: Just a moment.

Mr. Boyd: You may not testify what he told you Mr. Buchanan told him.

Q. (By Mr. Boyd): What was the end result of this conversation you had with this man?

A. The end result was that he told me I might still have a chance if I would go down and see Mr. Buchanan in person. He said that he was a pretty square guy and I might be able to talk to him.

Q. What did you do then, after he made that suggestion? [113]

A. Well, it was too late that day to go down and expect to find anybody in at the Union, so I went down the following Monday.

Q. This was Monday of the week in which you later got the job at Shuck? A. Right.

Q. What time was it, about, that you went down there? A. About four o'clock.

Q. With whom did you talk when you got there? Will you tell us in detail what transpired?

A. When I got there the same man was at the counter and I asked him if Mr. Buchanan was in. He said "yes", and pointed to a man back there, a man at a desk. So I walked back behind the counter and stood by his desk until I was noticed, and I said, "Are you Mr. Buchanan?" And he said, "Yes", and I said, "I am Dick Kieburtz and I was referred to you to try to get a permit to work this summer", and he said that he couldn't give me a permit and he

(Testimony of Richard Kieburztz.)

said that I should have whoever—well, I said that I had been offered a job if I could get a permit, and he said I should have whoever offered me the job call him, and I asked him if I could join, if I couldn't get a permit, if there was any way I could get clearance through the Union, and he said no, that if anyone had offered me a job I should have them call him, that that is the way it was done. And I asked him what good it would do me to have them call him, since I [114] did not see that he would give me the job anyway, give me clearance anyway, and he replied that that was the way it was done and that if anybody offered me a job I should have them call him, as all the work had to go through the hall. Then he cut off the conversation, returned to his work. The man at the counter told me that I should step around in front of the counter so these guys could get some work done, which I did.

Q. Incidentally, did you disturb the chairs?

A. I did not.

* * * * *

Q. (By Mr. Boyd): Did you hear Mr. Buchanan testify this morning? A. Yes.

Q. Did you hear the part of his statement concerning this particular episode? A. Yes.

Q. Do you remember what it was that he said that he had said?

A. He said that I had stated in effect, that it was none of his business as to who——

Q. (Interrupting) As to who you had a job with? A. Yes.

(Testimony of Richard Kieburtz.)

Q. Did you make such a statement at that time?

A. I did not. The only statement I made, that he might have [115] implied that from, was to ask him what good it would do me to have them call him.

Q. You went around in front of the counter, you say?

A. Yes.

Q. Did you have any further conversation with the dispatcher?

A. Yes.

Q. What was that?

A. I asked him how I could go about getting in the Union, and he said that he didn't know. And then I asked him how anybody ever did get into the Union. And he said that they got into the Union at a time when there was a demand for men, at a time that most of the Union's men were already working and the employers wanted more. And I said, "Do you mean there is no way at all that I can get clearance from the Union and get a job?" And he said, "That is right." And he asked me if my father had ever belonged to a Union and I said no, that he used to hire men. And he said, "Well, that explains your outlook." He said, "There is nothing I can do for you." That was about the extent of that conversation.

Q. What, then, later developed, with reference to your employment by Shuck?

A. That same day, Monday, I had gone down to Shuck's offices to try to contact Mr. Benson, but again he wasn't in. Then Tuesday evening my father received a call from Mr. Benson asking if I could

(Testimony of Richard Kieburtz.)

come to work. He said that I would be there, on the [116] Mercer Island job.

Q. And did you go to work then?

A. I did.

Q. When did you report for work?

A. About a quarter of eight on Wednesday morning.

Q. To whom did you report?

A. To Mr. Sayler.

Q. That is the gentleman who was on the stand ahead of you? A. Right.

Q. What transpired when you reported? What was said between you and him?

A. He obtained my Social Security number and name and address and he said, "We'll have to see how this Union business works out later."

Q. He made this remark to you? A. Yes.

Q. What, if anything, was said by you to him that prompted that remark? A. Nothing.

Q. Do you know what it was that prompted that remark?

A. Only that he knew I was not a member of the Union.

Q. From this earlier conversation?

A. Yes.

Q. Was there something that passed between you and him at that time that indicated he knew that you were the person who [117] had called there the week before?

A. I don't recall any words, but I believe he knew that.

(Testimony of Richard Kieburtz.)

Q. Following that, were you assigned to work?

A. Yes.

Q. And to what work were you assigned and by whom?

A. Mr. Sayler told me to get my instructions from Mr. Tucker. He called him "Chester" at the time. So I went over to him and he told me to start carrying lumber from a, it was a pile of two by fours and shiplap near the tool shed, over to another smaller pile about a hundred yards away. And there was another laborer already doing this, and he told me to follow him.

Q. Who was the other laborer?

A. Sam Swatack.

Q. Incidentally, so the record may show it, how tall are you, and what do you weigh?

A. I am six feet one and weigh 165 pounds.

Q. Did you perform any of this work to which you were assigned with Swatack?

A. I did.

Q. For about how long?

A. For about half an hour.

Q. Was there any comment to you from Tucker or Sayler concerning your work?

A. No.

Q. What work were you assigned to after that?

A. After that I believe it was Mr. Sayler who told us that that was enough, and to grab a shovel and come with him. So we went into the tool shed and Sam grabbed a pick and shovel and suggested that I grab a pick as well as a shovel, so I did, and we followed Mr. Sayler over to this excavation.

Q. And which excavation is this?

(Testimony of Richard Kieburtz.)

A. I believe it's the one for the gymnasium.

Q. Was this the wall footings or the column footings? A. Wall footings.

Q. An excavation for the wall footings?

A. Yes, it was an excavation with ditches inside it for wall footings.

Q. What specifically were you assigned to do?

A. Mr. Sayler told Mr. Tucker what he wanted done, and then Mr. Tucker gave us our specific instructions.

Q. And what were they?

A. To dig out these ditches and to, to clean them out and move them over. They were dug a little bit in the wrong place, with a mechanical shovel. And there were overhead wires which marked the outside concrete line for the wall, and he marked off a piece of lath to use for a guide stick and we were to drop a plumb line from the wires and use the guide stick to indicate how wide to dig the ditch, to indicate what the inside line of the ditch was to be. And he marked another stick for us, or I guess it was cut to length, to indicate the depth of [119] the ditch below the wires. And we were to cut the ditch over to where it was supposed to be and level it out.

Q. Is that what you did do?

A. That is right.

Q. For how long did you continue in that work?

A. For the rest of that day.

Q. Did you and Sam work side by side in doing that work?

A. No. I worked in one ditch, on the east side of

(Testimony of Richard Kieburtz.)

the excavation, and he worked in another, on the west side, to start with.

Q. And were you assigned to any other work on that first day, than this which you have now described? A. No.

Q. All right. Was there any comment to you by Sayler or Tucker concerning the quality of the work that you were doing or how you were doing the work in the course of that day? A. No.

Q. What was the work that you were assigned to in the next following day?

A. The following day, the first thing in the morning I was told to carry some sheetrock out of the tool shed over to some, inside the enclosure of the forms, the class room unit, and to help the carpenter set up some form panels on horses to use for a table to cut the sheetrock on. The sheetrock was cut for use in these forms for the pier footings. [120]

Q. Column footings? A. Column footings.

Q. Did you do any work in connection with cutting the sheetrock for the column footing forms?

A. No.

Q. What transpired? What was your next job, then?

A. After that, why, the concrete truck, the first concrete truck had arrived and was starting to pour into the wall footings, so I went over and grabbed a stick and started helping move the concrete along the forms, to tamp it.

Q. That is, to settle the concrete in the form?

A. Yes.

(Testimony of Richard Kieburztz.)

Q. Was any comment made to you while working with the carpenters concerning your, the way you were doing your work, when working with them?

A. No.

Q. When you went over to, and started tamping or settling the concrete, were you assigned to that by any specific order?

A. No. While I was doing it, however, why, Mr. Tucker came over with a stick himself and suggested that I move over to the other side of the target to work at it.

Q. What prompted you, how did you know to do that work?

A. The target is just a piece of plywood or pieces of shiplap nailed together for the concrete to hit so it can fall into the forms instead of over shooting them. I was working on one side [121] of it, and he suggested that I move over and work on the other side of it.

Q. What was it that prompted you initially to go over there and start to tamp the concrete?

A. Well, I was through carrying the sheetrock out. The carpenters said that was enough. And the truck had arrived, and they obviously needed another man over there to do it. So I went over to do it.

Q. In the course of your doing that, was there any comment to you, by anyone, Tucker or Sayler, or anyone else, concerning the manner in which you were doing that work?

A. No.

(Testimony of Richard Kieburtz.)

Q. How long did you continue in the tamping operation?

A. For about 45 minutes, I imagine.

Q. And then what happened?

A. Then Mr. Sayler told me to grab a shovel and start back filling around these forms for the column footings that the carpenters had been making up and putting into the holes.

Q. These holes were mechanically dug holes?

A. Right.

Q. In various spots around what would be the interior of the building?

A. Yes.

Q. And they had set these forms in these holes?

A. Yes. [122]

Q. And your instruction from Sayler was to do what?

A. To fill in around it.

Q. To throw up dirt around the form?

A. Yes.

Q. Was that the extent of your instruction from Sayler?

A. At that time, yes.

Q. Was there any further instruction later?

A. Yes. Later, the concrete inspector, who was on the job had been inspecting the forms and the holes, and he talked to Sayler, so Sayler cut a stick the proper length for me and made sure all the forms were dug down as deep as that stick, so the stick would be flush with the top of the forms.

Q. So as to make sure the forms set low enough?

A. At least that deep, and to clean the debris out of the inside of the forms so they had a solid bottom.

(Testimony of Richard Kieburtz.)

Q. After giving you that instruction, what did you do?

A. I did as I was instructed. I continued filling in around them and I cleaned the debris out of the inside, and in a couple of cases where I found they weren't deep enough, why, I dug down inside the form and got them deep enough.

Q. Did Mr. Saylor or anyone, Tucker or anyone else, comment to you on the manner in which you were doing that work after you had been told what to do?

A. No.

Q. How long did you continue at that work?

A. Till about an hour after lunch.

Q. Did you work alone in doing that work?

A. No. After the walls, pouring of the wall was completed, why, the laborers who had been working on that came over and helped me fill in these holes, back filling.

Q. Doing the same type of work that you were doing?

A. Yes.

Q. You say an hour after lunch you were assigned to something else?

A. Yes.

Q. To what?

A. To continue digging out these ditches in the excavation, the same as I had been doing the day before.

Q. That is, to clean out the wall excavation, for the wall form, in the way that you had done the preceding day?

A. Yes.

Q. How long did you continue at that work?

A. Until about an hour before quitting time.

(Testimony of Richard Kieburtz.)

Q. And then were you assigned to something else?

A. Then I was assigned to the same type of work in another set of ditches.

Q. That is, at another building location, or at another ditch on the same building?

A. Another building.

Q. In relation to that work, was there any comment made to you [124] by Tucker or Sayler or anyone else concerning the manner in which you were accomplishing the work?

A. No.

Q. Or the speed?

A. No.

Q. And you say you were assigned to another building location, to do similar work at another building location, about an hour before quitting time?

A. Yes.

Q. Were you assigned alone or was anyone else assigned with you?

A. I was assigned alone.

Q. What was Sam doing at that time, if you know?

A. I don't know.

Q. Was he working with you up until the hour before quitting time?

A. I believe so.

Q. You think he was doing the same type of work?

A. Yes.

Q. All right. Did you finish out the day working on this second building?

A. Yes.

Q. What did you do on Friday, the third day? What was your assignment then?

A. To continue digging out those ditches on the second building. [125]

Q. And how long did you continue that?

(Testimony of Richard Kieburtz.)

A. Until about ten o'clock.

Q. And then was there any comment made to you on this third day of your employment, while you were working at this ditching of the second building, concerning the manner in which you were doing the work?

A. None.

Q. What occurred at ten o'clock?

A. At ten o'clock I was told to go over and help Sam carry form panels.

Q. What were these form panels and to where were you carrying them, and what was the type of them?

A. The form panels were on the outside of the forms for the class room unit. They were, I guess, about four by eight, maybe a little longer, a little narrower, made out of plywood and two by fours, shiplap in some cases.

Q. When you say four by eight, you mean four by eight feet?

A. Yes.

Q. And the plywood was what?

A. The plywood was the surface.

Q. What was the function of the two by fours?

A. Reinforcing.

Q. To where were you carrying these?

A. We were to carry those along the inside of the forms and place them end to end so that they would be in place for the [126] carpenters to put them up.

Q. Did you work alone on this assignment?

A. I worked with Sam.

Q. It took two of you to carry this long form?

(Testimony of Richard Kieburtz.)

A. Yes.

Q. Was there any comment made to you by anyone, Sayler or Tucker or anyone else, concerning how you were accomplishing this work when working with Sam? A. No.

Q. How long did you continue at this work?

A. Until about lunch time.

Q. Were you assigned any other work at that time?

A. I don't remember whether I was assigned or not, but I went back to work in the ditch again.

Q. That is, did you finish carrying the panels?

A. Yes.

Q. You finished that job and then you went back to work at the ditch? A. Right.

Q. Did anything else transpire in the course of the morning? A. Yes.

Q. What did?

A. About 10:30 the business agent came out to the job. The men called him "Red."

Q. How did you know he was a business agent?

A. I asked Sam who he was. And Sam said, "That is the guy that can get your job." And I said, "Do you mean that is a business agent?" And he said, "Yeah."

Q. What transpired? What did you observe when he came to the job?

A. Well, I observed him talking to Mr. Sayler. During the course of the conversation he pointed over in my direction, and——

(Testimony of Richard Kieburtz.)

Q. (Interrupting) Who pointed in your direction?

A. I don't remember. Either Mr. Sayler or the business agent.

Q. Then what happened?

A. Then he went over to talk with Mr. Tucker.

Q. Who did?

A. The business agent. And when he was through talking with Mr. Tucker, he came over to me and asked me if I had a card or anything.

Q. Was that his expression, were those his words?

A. Yes. He said, "Have you got a card or anything?"

Q. And what did you say in response?

A. And I said, "No, but I would like to join the Union, though."

Q. What did he say in response?

A. He said, "No, I am sorry, I can't let you."

Q. And then?

A. And then Mr. Tucker came over and said to the business agent, "We will let him work out the day." And then I continued talking with the business agent. I said, "I thought if I [128] had a job I was entitled to join the Union." And he said, "No, we have too many men on the bench, we can't take in any new members." And that was the substance of the conversation.

Q. What happened immediately after the conversation?

A. Immediately after the conversation the busi-

(Testimony of Richard Kieburtz.)

ness agent walked off and I resumed carrying the panels.

Q. Then, you continued on that particular assignment how long?

A. Well, you mean until I was through?

Q. Yes. When was it that you went from that work of carrying the panels to the next task, or returned to the original task of excavating the ditch?

A. Around noon.

Q. Did you at that time have any direct conversation with either Mr. Sayler or Mr. Tucker concerning the episode of the business agent appearing there?

A. At the noon hour, why, I talked to Mr. Sayler and he said that he would see me later to discuss this thing.

Q. Was that the extent of your conversation with Sayler? A. Yes.

Q. Did you talk it over with Tucker at all?

A. No.

Q. You had heard Tucker's remark earlier?

A. Yes.

Q. To what, then, were you assigned in the afternoon?

A. Digging out the, leveling out and placing these ditches, [129] clean out the ditches.

Q. Were you assigned from that to any other task in the course of Friday afternoon?

A. No.

Q. Was there any comment made to you in the

(Testimony of Richard Kieburtz.)

course of Friday afternoon concerning the manner in which you were accomplishing that work?

A. None.

Q. What transpired at the end of the day?

A. At the end of the day, well, it was Friday, it was pay day, I went over to pick up my check and Mr. Tucker gave me two checks, one for, for, one, through Wednesday, and the other for the other two days.

Q. Was there anything said between you two at this time?

A. Yes. He said, "Sorry, but that is the way it is." So I waited around until Mr. Sayler was through passing out checks and then I went over to talk to him, and he said, "I don't know just what to tell you, kid." He said, "We have to go along with the Union on this, or they can make trouble for us." He said, "We have to lay you off or the Union can make trouble for us." And, oh, yes, I said that I thought once you had a job that the Union couldn't get you fired. And I said, "Isn't that what the Taft-Hartley law says?" And he said that the contractor had an agreement with the Union to hire Union men through the hiring hall and they had to go along with the Union on that. And [130] I said, "That sounds like a closed shop." I was somewhat irate at that time. I said, "I thought the Taft-Hartley Law made that illegal." And he said, "No, this is a good contract and we have to honor it." And he said, "If you were my son or something, why, I could probably get the Union to take you in as a personal fa-

(Testimony of Richard Kieburztz.)

vor," but he said, "they don't have to take in anybody they don't want to." And that was——

Q. Was that the extent of your conversation with him? A. With him.

Q. Insofar as you were talking directly with him? There was a further conversation with someone else in his presence? A. Yes.

Q. We do not need to go into that. It's not material, particularly.

Following that day, which was Friday, did you have any further conversation with any representative of the Shuck Company?

A. The following Monday, after I had filed a complaint against them, I went down to their office to notify them that that complaint had been *file*, so it wouldn't come as such a shock to them.

Q. How did you happen to do that?

A. My father suggested that it might be just a kind of a shock to them, just to get it in the mail, and I might go down to explain it to them so they wouldn't just, because I wasn't actually [131] mad at them. They had given me a job, which no one else would do without the Union membership.

Q. With whom did you talk?

A. I talked with Mr. Gene Shuck.

Q. Eugene Shuck, the gentleman who testified here at some length this morning? A. Yes.

Q. Would you tell us what your conversation was with Mr. Shuck at that time?

A. I told him that I had been fired because I didn't belong to the Union and I said that I was fil-

(Testimony of Richard Kieburztz.)

ing charges with the National Labor Relations Board and he would probably get his copy in the morning and that I just wanted to let him know so it wouldn't come as so much of a surprise to him. And he said that he knew Mr. Benson had hired me, but he didn't know I had been laid off. And he asked me how I had been doing, if I had been putting out, and I said yes, I had been doing fine. And he said, "Well, we will just have to see how it turns out." [132]

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Cross Examination * * * * *

Q. (By Mr. Croson): After Mr. Benson called you, you reported, then, without any further direction, immediately to the job. You reported there on Wednesday morning? A. Right.

Q. And you talked with whom, then?

A. With Mr. Sayler.

Q. And Mr. Sayler had previously talked with you, had he? A. Yes.

Q. That was before you went to see Mr. Benson, wasn't it? A. Yes.

Q. Now, then, did you, on the day that you went out to the job, did you have any extended conversation with Mr. Sayler? A. Not extended.

Q. All right, now, then, can you again give me just what you and Mr. Sayler talked about and your conversation, as nearly as you can?

A. When I reported for work?

Q. Yes.

(Testimony of Richard Kieburtz.)

A. I told Mr. Sayler that Ben Shuck, I believe at that time I thought that was who had called, that is what my dad thought who had called me that night. I didn't know for sure, but I said that "Ben Shuck" had called me and told me to report for [135] work. And he said, "O. K. I guess we can get that Union business straightened out later."

Q. Now, what had you previously told Mr. Sayler about the Union business?

A. I had just told him that I was not a member, didn't have clearance. [136]

* * * * *

Q. All right. Now, who handed you your check?

A. Mr. Tucker.

Q. Who was the first person to say anything to you the evening of Friday, the 31st, when you got your checks? A. Mr. Tucker.

Q. Did you know when you got your two checks that that meant that as far as you were concerned, that your employment was at an end?

A. I did.

Q. How did you happen to know that?

A. Because I happen to know that it's the custom in that industry to give a man his check through the, all the time he has worked, to lay him off, and that all lay-offs of that type are considered permanent unless otherwise specified.

Q. Now, you had been employed as what? Give me the classification of your employment.

A. Construction laborer.

(Testimony of Richard Kieburztz.)

Q. Construction laborer. In other words, that was common laborer? A. Yes.

Q. You had worked before at common labor, as you have testified? [138] A. Right.

Q. How long were you employed on the Holly Hill job? That was 1952, I take it?

A. Not Holly Hill, no.

Q. When was the Holly Hill job? When were you working there? A. About 1950.

Q. About 1950? A. Yes.

Q. You were 16 years old at that time?

A. Right.

Q. How long were you employed there?

A. About two and a half months.

Q. About two and a half months. Did you have any permit of any kind to work at that time?

A. No.

Q. No permit of any kind? A. No.

Q. How long were you employed on the Key West building job?

A. About two and a half months.

Q. And what year was that? A. 1952.

Q. Did you work in 1951? A. Yes.

Q. Where were you employed then?

A. Part of the summer for Key West Builders and part of the [139] summer building our own house, working for my dad.

Q. Am I in error, that it was '52 that you were working with your father to build your house? My notes say that it was 1952.

(Testimony of Richard Kieburtz.)

A. That is right. I made a mistake. It was '51 that I worked for Key West Builders.

Q. Now, if I have it right, two and a half months in '50 for Holly Hill, and two months in 1951 for Key West, and then in '52 you worked for your father?

A. That's right. [140]

* * * * *

Q. Did you say anything to Mr. Sayler at any time about the fact that you could take care of the Union situation?

A. No.

* * * * *

Q. When the Union representative—I will speak of him as you do—"Red"—came on the scene, did you note the time that he came [142] out there?

A. It was about 10:30, I think.

Q. How do you fix that?

A. Just approximately.

Q. It was sometime after you had gone to work?

A. Yes.

Q. You would go to work at what time?

A. Eight.

Q. And, as best as you can tell us, it was around 10:30?

A. Right.

Q. Something else occurred at ten o'clock which you do remember?

A. Well, at approximately ten o'clock I began carrying the form panels.

Q. Did Red say anything to you, or did you speak to Red?

A. He said to me——

Q. (Interrupting) He opened the subject?

(Testimony of Richard Kieburtz.)

A. Yes. He said, "Do you have a card or anything?"

Q. And then you answered no, of course.

A. I said, "No, but I would like to join the Union."

Q. And then, as I understand it, he said they couldn't take you in because——

A. (Interrupting) He said, "I can't do a thing for you."

Q. Did that end the conversation?

A. No, that didn't end it then. Mr. Tucker came over and said [143] to Red, "We will let him work out the day." And then I talked to Red some more.

Q. And what was the further conversation with Red?

A. I said, "I thought if I had a job I was entitled to join the Union." And he said, "No. We have too many men out of work and we have to look out for them. We can't let you in."

Q. You said something about some conversation with Mr. Sayler with respect to, if you were his son or something of that nature. Straighten me out on that.

A. Oh. When he was explaining to me how he couldn't, well, the fact, he meant that he couldn't do anything to help me out with the Union, he said that if I had been his son or some close relation of his, then he might be able to get the Union to give me a permit as a personal favor to him.

(Testimony of Richard Kieburtz.)

Q. Now let us go back just a bit now, we have tried to cover conversations now. Let us go back to try to take up the nature of the work. Did you find that work pretty heavy?

A. Oh, reasonably so.

Q. When you were using the shovel, were you shoveling loose [144] dirt?

A. No. The first day I was using the shovel and the pick. I was picking and shoveling hardpan.

Q. And was anyone working near you or with you in that work?

A. Sam was working near me.

Q. Near. Now, about how far away?

A. He was working in another ditch, in the same excavation, doing the same——

Q. (Interrupting) About the same length ditch?

A. Yes.

Q. About the same depth ditch? A. Yes.

Q. How did you finish your jobs? Did you and Sam finish your ditches about the same——

A. (Interrupting) Well, it's very difficult to make a comparison, since Sam was called off the job at various times by carpenters and, well, supervisors, to help them.

Q. Did he finish the ditch on the west side as soon as you finished the ditch on the east side?

A. No.

Q. He didn't get his through as soon as you did?

A. No.

(Testimony of Richard Kieburtz.)

Q. How long was the ditch that you dug on the east side, or prepared on the east side?

A. About 30 feet or 35 feet. [145]

Q. Did you measure it or are you trusting to your memory now? A. I am estimating.

Q. You are estimating now, as the ditch appeared to you, then? A. Well, more or less.

Q. All right. When was your first assignment, then, to the cleaning out of these holes to prepare them for the pouring?

A. About, oh, around nine o'clock Thursday morning.

Q. And, as you told us, I want to clear this up certainly, the assignment was through Mr. Tucker, Tucker? You worked for him first?

A. I believe I worked for Mr. Sayler.

Q. For Mr. Sayler? A. Yes.

Q. He assigned you to that job? A. Yes.

Q. Did he at that time show you how to do it, and what to do?

A. At that time he told me to fill in around the forms.

Q. He didn't give you any cleaning up work or anything of that kind at that particular time?

A. No.

Q. How long after that was it that he did go back and give you instructions as to how to clean up, preparatory to the pouring?

A. Probably about half an hour.

Q. Did you go right to work on that job?

(Testimony of Richard Kieburtz.)

A. Yes. [146]

Q. Did you follow it through until he saw you again?

A. Well, I followed it through until the job was done.

Q. Until the job was done? A. Yes.

Q. So you left that job, then, as having been completed? A. Right.

Q. And ready for pouring? A. Right.

Q. How many of those holes were there?

A. Well—

Q. (Interrupting) That you had prepared and left, now, ready for pouring? A. Probably 16.

Q. Sixteen of them.

A. Something like that.

Q. And they were all ready, then, for the cement to be placed in? A. They were.

Q. And you had followed his instructions in cleaning them out? A. Yes.

Q. Did you see Mr. Sayler do any work on those holes after you had finished them?

A. I did not.

Q. Did Mr. Sayler have you go back to do any work on them? A. No. [147]

Q. Did you see anybody else doing any work on those holes? A. No.

Q. When was it that you saw the inspector, cement inspector, either looking at the job or talking to Mr. Sayler?

A. About the time I started working on that.

(Testimony of Richard Kieburtz.)

Q. About the time you started working on it?

A. Yes.

Q. Were you so employed and in a position to know when the cement was poured?

A. Into those forms?

Q. Yes. A. Yes.

Q. Had anyone else touched those holes, those 16 holes, prior to the pouring of the cement?

A. I don't believe so.

Q. You were present at all times there?

A. Oh, reasonably——

Q. (Interrupting) Within seeing distance and hearing distance?

A. Yes. I wasn't watching them at all times, but I don't believe anybody else touched them.

* * * * *

Cross Examination

Q. (By Mr. Jackson): Mr. Kieburtz, you have, I believe, [148] testified here that you were out at the Mercer Shopping Center and a man out there told you he might have a job if you would go down and see Mr. Buchanan, is that correct?

A. He told me I did have a job if I could get Union o.k.

Q. Then you went, as you said, went down to see Mr. Buchanan, and that was about July 24? Is that correct? A. No. It was about July 27.

Q. Oh, about July 27. And you testified you went in to see Mr. Buchanan. That is correct, is it?

A. That is correct.

(Testimony of Richard Kieburztz.)

Q. And Mr. Buchanan asked you if you had a job, is that correct?

A. No, I don't believe he asked me if I had a job.

Q. Well, did you tell him you had a job?

A. I told him I—yes, I told him—I didn't tell him I was working, I told him I could get a job if I had, yes, I told him there were two or three companies who would employ me if I had Union o.k.

Q. I see. And did he ask you where you could get those jobs? A. No.

Q. Did you have any conversation at all about where you could, where you might have a job?

A. Not except that he told me to have them call him.

Q. I see. O. K. Did you tell him that you wouldn't furnish the name of anybody where you got a prospective employer? [149] A. No.

Q. And he told you, then, the procedure of hiring students where they were just working for the summer, that for the prospective employer to call him, is that correct?

A. He didn't tell me that was their policy. He said that if I knew of anyone who had a job, to have them call him.

Q. I see. And did he tell you that if the employer, the prospective employer, would call him, why, he would then work out a permit for you to work? A. No, he did not.

Q. Well, did you ask him if a prospective em-

(Testimony of Richard Kieburztz.)

ployer would call him, whether he would give you a permit?

A. Well, I asked him what good it would do me to have an employer call him.

Q. You asked him what good it would do you to have an employer call him? A. Yes.

Q. Why did you ask him that?

A. Because I was under the impression that it would do me no good.

Q. I see. In other words, you just concluded that.

A. I wouldn't say that I concluded that. That was my opinion and I asked him to give him a chance to affirm or deny the opinion.

Q. Did he tell you that he wouldn't give you a permit if you [150] had the employer call the Union about your work?

A. No, he didn't say that.

Q. He didn't say that? A. No.

Q. So you just concluded that if you had the employer call him about getting you a permit, it wouldn't do you any good?

A. You might say that.

Q. So you weren't going to have any employer call the Union about getting a permit for you, is that correct?

A. You have to understand that I already had had one employer, I don't know if I mentioned this, but I already had one employer call.

(Testimony of Richard Kieburtz.)

Trial Examiner Royster: You testified about it.

The Witness: Testified about it?

Trial Examiner Royster: Yes.

A. (Continuing) —Well, one employer already called, and he told——

Q. (By Mr. Jackson): That is the man you were asking about, that told you to go down and see Mr. Buchanan?

A. Yes. [151]

* * * * *

Q. Well, when Mr. Buchanan told you that if you would have the employer, the prospective employer, call him, didn't he tell you that if that would occur, that you would get a permit to work for the summer?

A. No, he didn't tell me that.

* * * * *

Q. And he told you it was the practice that the Union had had for students who were being employed during the summer, if they [152] got a job, to have the employer call the Union or call him?

A. He didn't put it that way, he didn't say that it was the practice for students to, who were employed to have the employer call. He just said that I should have the employer call.

Q. Isn't that what you said that he had told you that that was the procedure they were following there at the Union?

A. No, he didn't tell me that was the procedure. He just told me to have them call the Union. He didn't imply, at least I didn't think so, that that

(Testimony of Richard Kieburtz.)

was the procedure. Wait, I take that back. He did say, "That's the way it's supposed to be done, the employer is supposed to call us." [153]

* * * * *

Further Cross Examination

Q. (By Mr. Croson): When you were seeking employment, you sought employment as a common laborer? A. Yes.

Q. What was your understanding as to what range common labor covered?

A. What range?

Q. Yes. What range of work. What was it?

A. Oh, digging, concrete work, stripping forms, cleanup, carrying lumber. Just general. [158]

* * * * *

Redirect Examination

Q. (By Mr. Boyd): Mr. Kieburtz, three questions. Mr. Jackson [159] put to you a question as follows: "Red Woods made no statement that you could not work on that job?", to which you answered, "Right." Do you mean by that, that he did not make that statement in so many words?

A. That is right.

Q. Or did you mean by that that he made no statement at all to you, concerning your working on the job?

A. He didn't say it in so many words.

Q. That was the purport of your answer?

A. Yes.

* * * * *

(Testimony of Richard Kieburtz.)

Q. Now, one other point only. Mr. Croson, in inquiring of you concerning the cleaning out of the footings for the columns, the pier footings, he listed from you that there were some 16 [160] that you had cleaned out. A. Approximately.

Q. More or less, approximately. Were there others in addition to that, which, in being instructed to clean out, you had filled in around.

A. No. The ones I had filled in around before being instructed to clean out, I went back and cleaned out.

Q. And those were included in the 16 that you worked on? A. Yes.

Q. Were those all the forms that were cleaned out and were filled around before that cement pour was made? A. No. There were some others.

Q. Done by these other men? A. Yes.

Q. How many other men were assigned to finish up the work before the concrete pourers came in?

A. Two.

Q. Who were they? Do you know them by name?

A. Mr. Root, I believe is his name.

Q. Mr. Leonard Root? A. Yes.

Q. And? A. And Sam.

Q. Sam Swatack? A. Right. [161]

Q. The other two laborers were put on the same job to get the work accomplished before they came in to pour the concrete? A. Right.

Q. So far as you know, did either of those two men work on any of these holes that you had worked on? A. No.

(Testimony of Richard Kieburztz.)

Q. And do you have any idea how many such pier footings there were altogether? Do you have any judgment on that, any recollection about it?

A. Oh, maybe 30, something like that.

* * * * *

Mr. Boyd: General Counsel rests. [162]

* * * * *

EVERETT SAYLER

a witness called by and on behalf of the Respondent employer, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Croson): You have stated your position and you have also stated the time that you were employed by the E. F. Shuck Construction Company. You have also stated that you were the general superintendent to this job. Now, Mr. Saylor, I want to follow through on all conversations with you and acts by you with respect to this young man. When was your very first contact with him?

A. Approximately ten days before he came to work.

Q. And that was where? A. On the job.

Q. On the job? A. Yes.

Q. What, if anything, did you say to the young man when he came? You have already told us about his coming and making application.

A. I told him I didn't have any work for [163] him then, but he might make an application down

(Testimony of Everett Saylor.)

at the office, there might possibly be a job there for him. [164]

* * * * *

Q. Was there anything at that first conversation, just so that the record is clear, just repeat what took place there between you and the boy when the boy came to work.

A. I asked him for his Social Security, his address, his telephone number, and things like that. I forget, I may have asked him if he belonged to the Union. I try to get all that information I can, because it's a hazardous job. If a man gets hurt, you want to find somebody to look after him. So I usually try and get all the information I can about a man who comes to work for me.

Q. What, if anything, was said by him with respect to Union or Union affiliation or anything of that nature?

A. Nothing that I recall.

Q. Nothing that you recall. Then you turned him over to the foreman, as I understand it?

A. That is right. [168]

* * * * *

Further Direct Examination

Q. (By Mr. Croson): In trying to follow the conversation down, I omitted one other thing. Did you have any conversation with [173] Mr. E. F. Shuck, Senior, with respect to the work being done by the young man?

A. Yes. Yes, we talked it over. I told him I

(Testimony of Everett Sayler.)

didn't think that he was going to make the man that I thought we should have on the job.

Q. Was Mr. Shuck himself, Mr. Shuck, Senior, personally on the job at the time that you were——

A. (Interrupting) Yes. He and I were observing the boy at the time.

Mr. Croson: That is all.

Cross Examination

Q. (By Mr. Boyd): On what occasion was this, Mr. Sayler? A. What do you mean by that?

Q. What day was this?

A. It was Thursday, I believe.

Q. On Thursday, Mr. Shuck was on the job then?

A. Mr. Shuck was on the job every day.

Q. You are talking about Mr. Shuck, Senior, I am trying to go pick out what day that was. On what day was it you talked with Mr. Shuck concerning Mr. Kieburtz?

A. It was on Thursday.

Q. What was Mr. Kieburtz doing at this time?

A. I can't recall those details, sir.

Q. You say you were observing him?

A. Yes. [174]

Q. What were you observing him doing?

A. Watching him move around, trying to do something. I think he was working over on the classroom somewhere.

(Testimony of Everett Sayler.)

Q. When you hired Kieburtz, you didn't hire him as an extra man, did you?

A. All men are extra.

Q. All labor is intermittent employment, isn't it?

A. Yes.

Q. Kieburtz was in no different category than any other man who would be on the job?

A. No.

Q. When you hired Lewis later, it was subject to being laid off when you didn't need him?

A. Two or three days, or a week.

Q. The fact was, you kept Lewis on the job several weeks after that, though, didn't you?

A. I think so, yes.

* * * * *

CHESTER A. TUCKER

a witness called by and on behalf of the Respondent employer, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Croson): State your name. [175]

A. Chester A. Tucker.

Q. You reside where?

A. 4227 South One Hundred Forty Second.

Q. How long have you lived in Seattle?

A. Since 1927.

Q. What is your occupation?

A. At the present, labor foreman, and laborer.

Q. Foreman and laborer?

A. That is right.

(Testimony of Chester A. Tucker.)

Q. You mean by that, that you are a working foreman? A. That is right.

Q. For what company?

A. Shuck Construction Company.

Q. What was your employment on or about the 29th day of July 1953?

A. I was a labor foreman for Shuck's.

Q. How long had you been working for him prior to that?

A. I think, if I am not mistaken, the week before, on Monday.

Q. About a week before? A. Yes.

Q. You are still employed by him?

A. That is right.

Q. And while you were employed by him, from July 29, 1953 through July 31, 1953, what were your duties?

A. I was to dispense the work out and do [176] work myself right along with the crew.

Q. You were what is termed as a "job foreman"? A. Well, labor foreman.

Q. Labor foreman? A. That is right.

Q. When was your first contact with Mr. Kiebertz, the young man in this matter?

A. Well, the first morning that he went to work, which was on Wednesday.

Q. On Wednesday?

A. Yes. And I detailed him, if I am not mistaken, to move this lumber, as he has so stated. Mr. Sayler and myself at times, where one of us is busy and the other one isn't, he dispenses the

(Testimony of Chester A. Tucker.)

work where the other one can't dispense it, if he is doing something else that is a little more important than what the other man is doing.

Q. Now, what did you assign that young man to? A. Moving two by fours and shiplap.

Q. When was your next contact with the young man?

A. Well, it was continuous practically, working with the man, in and around him at all times, if this was to be done, or that was to be done, he or Sam or Leonard Root, one of the four of us, would do it, or two of the four of us.

Q. Did you have anything to do with assigning him to the cleanup work, as far as the pits were concerned? [177]

A. I think I did send him over to do the work. Saylor wanted someone, so I sent him over to do it. And he was on the concrete pour, if I am not mistaken, that was after the trucks come out—well, am I getting ahead of myself here? Was that on Thursday?

Q. This was on Wednesday.

A. Wednesday. I am going to go back a ways. They were digging those, after they were machinery dug, on Wednesday, or previous to Wednesday we had to hand-dig those and level them out.

Q. Did you assign him to that work?

A. And then on Wednesday, if I am not mistaken, he was assigned right along with the other boys, to dig these down to grade and level them out so the carpenters could put the forms in.

(Testimony of Chester A. Tucker.)

Q. If I understand it correctly, he was the newest laborer who was on the job?

A. That is right.

Q. I will ask you if you did observe his work.

A. I did.

Q. What was your conclusion with respect to him as an employee?

A. Satisfactory, but he wouldn't take orders.

* * * * *

Q. (By Mr Croson): Just what do you mean by that?

A. Well, you would ask the man to do something and he would do it his own way, not the way that he was instructed to do it. [178]

Q. Do you refer particularly to any particular matter? A. Well, one, yes.

Q. That you have in mind?

A. Yes. In the boiler room pit. In fact, he didn't do his work correctly there, and if I am not mistaken, from conversation I have heard since then, he was called back.

Q. Just a moment. You can't—

A. (Interrupting) I didn't hear it at that particular time, but the carpenters called someone else to finish his work up.

Q. Did you and Mr. Sayler have any discussion in your respective position as job foreman and superintendent?

A. Yes. When I work 60 and 70 men I am not a working foreman, where I am not a working foreman, only the man that just sees that the work is

(Testimony of Chester A. Tucker.)

done, and if a man doesn't do his work, he just doesn't do it, and I can't keep him around. I have to put out my work. That is expected of me by the company.

Q. Did you make a report to Mr. Sayler?

A. To Mr. Sayler, that "I didn't think the man would cut the mustard," as I put it. [179]

* * * * *

Q. In your judgment, was the young man a satisfactory employee for the E. F. Shuck Construction Company on this particular job?

A. He was satisfactory, but would not take orders, as I have so stated before. [181]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Jackson): Did you ever have any discussion with Mr. Kieburztz on the job about him, about a Union permit or a Union work permit?

A. No. He come through the office and I took it for granted that he was shifted from one job to the other, as E. F. Shuck employees are.

Q. So you had no discussion as far as the work permit or——

A. (Interrupting) No, he hadn't discussed it with me, or hadn't approached me——

Q. (Interrupting) And you hadn't approached him? [183]

A. No. I took it as it was, through the office.

Q. You assumed he came on the job just like any other laborer comes on the job, is that correct?

(Testimony of Chester A. Tucker.)

A. That is right.

Mr. Jackson: I think that is all.

Cross Examination

Q. (By Mr. Boyd): You are a member, are you not, of Local 242 yourself? A. Correct.

Q. Were you dispatched to the job?

A. Was I dispatched to this job?

Q. Yes.

A. No. Working as a foreman, I don't have to be dispatched.

Q. That is right. Now, you did know Red Woods personally?

A. No. I haven't known Mr. Woods, other than on the job. That is my first employment in the section that he has jurisdiction as business agent over.

Q. That is the matter to which I was referring. When he came on the job, he came on the job——

A. (Interrupting) The second time he was on the job, I had recognized him from the first time he was on, at which I introduced myself, and I knew who he was the second time he was on the job.

Q. You knew he was the assistant business agent of Local 242?

A. I thought he was a business agent. [184]

Q. On this occasion when he came on Friday, he did talk with you?

A. I think he said a couple of words. I don't know what he said right off hand, but I think he

(Testimony of Chester A. Tucker.)

did tell Mr. Kieburztz to get himself straightened out with the Union. No implications that he was going to work there, or if he wasn't going to work there, he was going to work with any other place. He just told him to get straightened out with the Union.

Q. You heard him say that?

A. Yes. And he also told him to come down and see that he got straightened out with them.

* * * * *

Q. Now, you made an allusion to Kieburztz working on the boiler room pit.

A. Illusion? It was a fact.

Q. You referred to him, you alluded to him working on the boiler room pit. Where is this boiler room pit?

A. It is approximately 26 feet from the administration building, just across the walkway.

Q. How big an excavation is this?

A. Well, where the boilers sat, it was approximately 16 by, [185] approximately 20 by 16.

Q. What was the work to which these laborers were assigned, with reference to that?

A. Digging, putting wall together up for the boiler to set in, within the building.

Q. Was this a pit? An excavation in the ground?

A. That is right. Then they had to use a pick and shovel and get it down to grade.

Q. How deep was this excavation?

A. About four feet.

(Testimony of Chester A. Tucker.)

Q. At the bottom of this four foot excavation, they were digging that down to how much farther, what depth?

A. I think to a depth of about three foot. That was just in the boiler pit itself. They had two along side each other.

Q. Kieburtz was assigned to what particular task in the boiler room excavation?

A. If I am not mistaken, Mr. Kieburtz was digging on the east end and Sam Swatack on the west end. There were two pits running along side of the other, and I am not sure who was where, to tell you the truth.

Q. Do you recall on which day it was he was assigned to this work?

A. I think, if I am not mistaken, it was Wednesday, and also Friday.

Q. Wednesday and Friday? [186]

A. And he was also on the administration building. In fact, they were all over the place. When they had something to be done, I had them in there doing it, or I did it myself.

Q. In order that I may understand this, Mr. Tucker, this boiler pit excavation that you refer to has no connection with the excavation for footings for the walls of the building. That was a separate excavation?

A. That is right. This is within the building itself.

Q. Inside what would be the foundation wall?

(Testimony of Chester A. Tucker.)

A. Yes. But they were also foundation walls for the boiler pit, for the boiler to sit in.

Q. It is your recollection, do I understand, that he did some of the work in this boiler pit excavation on both Wednesday and Friday?

A. If I am not mistaken, yes, he was in there both of those days. Because Thursday, I am positive, we all poured, poured this concrete, and after we got that done we had to backfill for the following pour for the following footings, up to the center of this building, and also getting ready for the west side of the class room, footings and walls.

Q. You say, so far as actual performance of the work that he was doing, it was satisfactory, but he wouldn't take orders?

A. He was a little bit too headstrong. He wanted to do it his own way. That is why I was put there. If I didn't know how to do that work, I presume, anyway, that I wouldn't be there. [187] Someone else would be doing what I was supposed to do, getting the work out, in that case.

Q. Will you give us specifically your recollection when you gave him orders that he would not comply with?

A. Specifically it was in the boiler pit. I asked him to come over to drop this string down from the wire. It wasn't that particular thing that I am getting at. I asked him to move the wall over where it was supposed to be put, but I come back and he hadn't done anything about it. So what am I to think of the man, if he wants to do the work him-

(Testimony of Chester A. Tucker.)

self, his own way, why, then why should I tell him what to do?

Q. This boiler pit, it's in what building?

A. It's in the boiler room building.

Q. It is a separate building, the boiler room building? A. That is right.

Q. Is there a middle partition, a footing for a middle partition in the boiler room building?

A. That is right.

Q. There is? A. That is right.

Q. Is this excavation that you are referring to, the excavation for the middle partition?

A. It is for the boiler pits themselves.

Q. For the feet of the boiler to rest on, the concrete footing for the boiler to rest on? [188]

A. No. Now, this is built up three foot. And then they have an iron base (Indicating) for the boiler to set on this iron base. Yet, this iron base sits within four walls of concrete.

Q. Yes?

A. And it also has a slab on the bottom of concrete. So that is what these boys were digging out, these walls up through here (indicating) and around this way. (Indicating)

Q. When you say "these boys", you mean Kie-burtz and Sam?

A. Mr. Kie-burtz and Mr. Swatack.

Q. Did they also dig the footings for the outside walls at that particular time?

A. No. Only on the pits. That was a rush order at that particular time.

(Testimony of Chester A. Tucker.)

Q. The specific work that they were assigned to do, you say, was that of relocating what would, or rather moving over the excavation?

A. Foundation, that is——

Q. (Interrupting) That is, digging over it so the foundation could itself be moved over?

A. Be put in line with what it was supposed to be put, yes.

Q. And there was a guide line that they dug with reference to? A. That is right.

Q. And the size of that building was about what? A. About 40 by 24, I think.

Q. And the size of the pit was what? [189]

A. Those pits were three foot, and there was a place between them that was about three foot by twelve, if I am not mistaken.

Q. Do I understand that the pit itself had walls?

A. That is right. The pit itself had walls, three foot high walls, and then this iron bed sat down in there, and the tanks, the boiler, sat on top of that.

Q. Who else was working as a common laborer on these particular boiler pits, besides Kieburtz?

A. Sam, and also Root did a little work on them, too.

Q. How did you classify that work, in making out your daily report?

A. Well, "hand excavation", if I am not mistaken.

Q. Hand excavation?

A. I think that is the way it was written up on the report.

(Testimony of Chester A. Tucker.)

Q. Was any of that work done in the following week?

A. Yes. There was some of it. But mostly it was on top.

Q. But I mean the excavation for the walls of the boiler pits.

A. No. That was finished that week.

Q. Who gave Kieburztz the instruction as to how the work was to be done in the boiler pit?

A. Well, I don't know. I just assigned him to the job and, as I said before, I took it that he was a man from the company, he knew what he was doing, until I had my own theories of what he did know and didn't know. If a man doesn't strike you where he can fulfill his duties, then you start thinking about letting [190] him go, and getting someone that can.

Q. But you did not give him the specific instructions as to what he was supposed to do in the boiler pit?

A. Just to dig this footing out, which I told him he could follow a line, and Sam was down with him, so I figured they could get along to where they were supposed to get along.

Q. Incidentally, this Bob Lewis who came on the job later, he came on the job with a permit, before he was put to work, did he not?

A. Yes. He showed me a permit before he went to work. [191]

* * * * *

SAM SWATAACK

a witness called by and on behalf of the Respondent company, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Croson): Your name is Sam Swataack? A. Yes, sir.

Q. Where do you live, Mr. Swataack?

A. 3922 Eddy Street.

Q. How long have you lived in Seattle, Mr. Swataack?

A. Well, the second time I was, the second time, since May 1938—48, I mean.

Q. '28? A. '48.

Q. What was your occupation, Mr. Swataack, on or about the latter part of July, 1953, this last July?

(No response.)

Q. Where were you employed this last summer? A. Mr. Shuck's job, on the school.

Q. On Mr. Shuck's job? A. Yes.

Q. What school was it?

A. Mercer Island school.

Q. Mercer Island school. Do you know [205] when you went to work there, Mr. Swataack?

A. Well, I am not exactly certain about that. In the middle of July, I suppose, something like that.

Q. Do you know Mr. Kieburztz, who is sitting here at the table? A. Yes.

(Testimony of Sam Swatack.)

Q. Did you and he work together on that job?

A. Yes. Three days, I think.

Q. Three days? A. Yes, I think.

Q. Do you remember the day that he first came out there? A. Yes. I remember that.

Q. And what work were you assigned to that day? Speaking about you now. What work were you assigned?

A. Well, we carried lumber and cleaned up for footings, ditches.

Q. Do you know whether or not Mr. Kieburtz was doing the same kind of work?

A. Well, it seems to me he is not experienced.

Q. Was he assigned to the same kind of work?

A. Yes, labor.

Q. Did he carry any lumber that day?

A. Yes.

Q. What did he do with reference to the footings?

A. We cleaned her up and digged a few inches here and there, that machine, they dig rough, so we have got to prepare, and cleaned it up, and we digged some places a little bit more, and [206] so on.

Q. What other work did you do during the period of time that Mr. Kieburtz was there?

A. Oh, we would do the same jobs, but once in a while the carpenters would call me to bring some lumber or something else over to them.

Q. I will ask you if the two of you were at any

(Testimony of Sam Swatack.)

time assigned to digging the ditches or dressing up the trenches? A. Yes, we did. [207]

* * * * *

Q. Yes. You said a moment ago, Mr. Swatack, that Mr. Kieburtz seemed to be inexperienced. Just tell us what you mean, now, by that?

A. I mean, he come in to me many times and asked me how should be done this and that, you know, and things, and the same way, I have been working five years that job and I can tell easy the old-timer working with me, or just youngster beginning, you knew, I can tell easy, it's——

Q. Did he do as much work as the, as you did? That is, in a day?

A. I can't say that because maybe he did it, but it's not how much you work but how much is done on a job. That is what I figure.

Q. How much you get done on the job?

A. Yes.

Q. Did he get as much done on the job as you got done on the job?

A. Well, I don't pay much attention to that, because it's not my job, but I don't think so.

* * * * *

Cross Examination

Q. (By Mr. Boyd): Mr. Swatack, do I understand from your testimony that on the first day he came on the job, that you and he were first assigned to carry lumber?

A. Yes, a few. Not long, maybe a few minutes, half hour.

(Testimony of Sam Swatack.)

Q. And then following that, you were assigned to do some excavating on some trenches?

A. Yes.

Q. In order that we may be clear, do you know what these trenches were for?

A. I don't know. I know it was for the bottom of that building, to put the concrete.

Q. It was for the footing of the wall, is that right? A. That is right.

Q. Have you been on the job there since the job has been completed, or are you still working there? A. Yes.

Q. They have built a wall there now, haven't they?

A. Well, not yet, but we have got the concrete poured.

Q. You have got the concrete poured?

A. The wall is not built yet.

Q. The wall is not built yet? A. Yes.

Q. But it's put in there for the purpose of a footing for a concrete block wall, is that right?

A. That is right. [211]

Q. And that was the trench that you and Kie-burtz, the type of trenches that you and Kie-burtz were working on that morning? A. Yes.

Q. Now, in order to get the thing clear, was this trench up at ground level, or was it down in an excavation?

A. Ground level? You can't put a trench on the top of the ground.

Q. I know that.

(Testimony of Sam Swatack.)

A. I am sorry, but——

Q. (Interrupting) Let me put it this way, Mr. Swatack——

A. (Interrupting) That is kind of catchy to me, because if I make a hole in the ground, it can't be on the top of the ground.

Q. I suspect you are right about that. Now, may I ask you the question and perhaps I can make myself understood to you? A. Yes.

Q. Had this trench been dug by hand or by means of a machine?

A. Machine, but machine, you don't dig a hundred per cent with that, you know.

Q. All right. Now, this trench that you speak of, how wide was it?

A. Oh, approximately two feet.

Q. About two feet wide?

A. Yes, maybe more, maybe less.

Q. And how deep was it?

A. I, if I don't be mistaken, about 18 inches.

Q. About 18 inches deep?

A. About. I am not sure.

Q. Again, I ask you, was this trench that you were working in, which was two feet wide and 18 inches deep, was it dug down from ground level 18 inches deep or was it in the bottom of an excavation 18 inches deep?

A. I think from the top of the ground.

Q. From the ground level, is your recollection?

A. Yes.

(Testimony of Sam Swatack.)

Q. Have you been, are you working around that building now? A. Yes.

Q. Is there not a basement in that building?

A. No.

Q. There is no basement in the building?

A. No.

Q. Was there at that time an excavation for the purpose of putting a concrete floor at a level higher than the ground level in that building?

A. I——

Q. (Interrupting) I will ask the question again. It is confusing. Was there a large excavation in the, inside the walls, where these walls were to be?

A. No, it was all level up, all to the ground——

Q. (Interrupting) It was level, except for this little trench that was two feet wide and 18 inches deep? [213]

A. Practically, yes.

Q. And those were the trenches that you worked in on that first day?

A. With him, yes.

Q. With Kieburtz?

A. Yes. [214]

* * * * *

Q. Was there any time, then, when you and he worked in the same trench?

A. Well, for that boiler room, I think we did.

Q. Pardon me?

A. In the boiler room, we worked on the same trench.

Q. In the boiler room you worked in the same trench?

A. Yes, a kind of a big, some, yes, we did, in the same trench.

(Testimony of Sam Swatack.)

Q. What was this trench that you speak of in the boiler room? A. For the wall.

Q. For the wall of the boiler room?

A. Yes. [215]

* * * * *

Q. One thing more. You alluded to the fact that at a later time you and he were working on footing ditches for the boiler room. Is that right?

A. Yes.

Q. That was at a later time? A. Yes.

Q. And those footing ditches were for the outside walls of the boiler room, were they not? [222]

A. Outside walls, yes.

Q. Did you do any work on a boiler pit?

A. Yes.

Q. Did you? A. Yes.

Q. Did Kiebertz do any work on the boiler pit?

A. I am not remembering. I think he did.

Q. As a matter of fact, the boiler pits were not dug at that time, were they? Or were not poured—were not dug at that time, were they?

A. Well, there is too many jobs. I cannot remember everything. When I am working hard sometime, I just can't remember the next day what I did. But I do know I worked with him in that place, for walls, I think. I don't know.

Q. I did not understand your statement.

A. I worked on that job with him, but I guess on wall footings, or something.

Q. On the wall footings?

A. Yes. Of course, at that time, it was kind of

(Testimony of Sam Swatack.)

a rough idea, you don't know what you are working on. They tell you to dig someplace, and that is that. [223]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Croson): Just explain further to us why it was that you did not like to work with Mr. Kieburztz.

A. Because he does not have experience as much, and it seems to me he is too young, he is just a young kid. [234]

* * * * *

Recross Examination

Q. (By Mr. Boyd): You are a member of Local 242, Hod Carriers? A. Yes. [235]

* * * * *

Q. The last question I asked you was this, did you not, while Kieburztz was out there working with you, tell him that you thought that he should not have the right to work there because he didn't belong to the Union?

A. No, I didn't think so.

Q. What was your conversation with him?

A. But he stated about the Taft—what do you call it—Law or something, I didn't know anything about it. I am not a politician, I know nothing about Taft Law, and he says that anybody can work where they please under the Taft Law, and I said, "I don't know. I belong to the Union." And that is all I say, because I know nothing about

(Testimony of Sam Swatack.)

politics. I don't know nothing about the Taft's Law. [236]

* * * * *

E. F. SHUCK, SENIOR

a witness called by and on behalf of the Respondent Employer, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Croson): Mr. Shuck, you have been here during the entire hearing? A. Yes.

Q. There has been testimony here about your being present on the job after Mr. Kieburtz came on the job, and I direct your attention to Wednesday, July 29, and ask you if you were on the job that day. A. Yes.

Q. Did you see Mr. Sayler that day?

A. Yes.

Q. This was in the ordinary course, I take it, of your business, and his business?

A. That is right.

Q. Did you observe the men who were at work?

A. Yes.

Q. Did you at that time see Mr. Kieburtz, who is sitting here at the table?

A. Yes, I saw him.

Q. Did you at that time form any opinion as to whether he was [237] suited for this work?

A. I did.

Q. Did you communicate that?

A. I did.

(Testimony of E. F. Shuck, Senior.)

Q. To whom?

A. To Mr. Sayler, the superintendent.

Q. What was that?

* * * * *

A. I shook my head, as customary. I haven't time to discuss the qualities of any man on the job. I shake my head if I am not satisfied.

Q. Did you visit the job site the next day?

A. Yes.

Q. That was routine, was it?

A. That was routine.

Q. Did you again see Mr. Sayler?

A. That day, yes.

Q. Did you see the young man that day?

A. I did.

Q. Did you say anything to Mr. Sayler that day?

A. Mr. Sayler spoke to me about him and I told Mr. Sayler, "Well, let's get rid of him as soon as convenient." [238]

* * * * *

Recross Examination

Q. (By Mr. Boyd): What time of the day was it on Thursday that you told Sayer to get rid of him? A. That was in the afternoon.

Q. And your instruction to Sayler was to get rid of him as soon as he could? A. Yes.

Q. What was Kieburztz doing at this time?

A. As I remember, he was working with the pick and shovel.

Q. Doing what? A. Shoveling dirt. [241]

(Testimony of E. F. Shuck, Senior.)

Q. Where? A. On the premises there.

Q. Where? A. One of the buildings.

Q. Which building?

A. Offhand, now, I can't remember.

Q. What type of work was he doing? You say pick and shovel, but what part of the building?

A. I don't remember offhand right now. You see, I cover many jobs and I have many men more important to me than that kid is. [242]

* * * * *

EUGENE F. SHUCK, JUNIOR

a witness called by and on behalf of the Respondent Union, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Jackson): Will you state your name? A. Eugene F. Shuck, Junior.

Q. And you have already testified here previously? A. Yes, sir.

Q. Mr. Shuck, how many years has your firm been engaged in the construction business?

A. Oh, I think Dad started either '33 or '34 in a small way, and we gradually worked up.

Q. During that period of time, how long have you been identified with the construction business?

A. Well, actively, I would say since, it would be '35. I got [249] out of high school in '34. So it would be in the Fall. I started in as a bookkeeper and swamper, a little of everything. [250]

* * * * *

Mr. Jackson: I think that completes the Union's case.

Mr. Boyd: How about the A. G. C.?

Mr. Iversen: I have not witnesses.

Mr. Boyd: I would call Mr. Kieburtz on rebuttal.

RICHARD KIEBURTZ

a witness called in rebuttal by and on behalf of the General Counsel, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): You were present yesterday during the testimony of Mr. Sayler concerning the work which he said he observed you doing on Thursday, when he alluded to your working in a boiler pit excavation? Were you present and heard that testimony? [252] A. I was.

Q. In your testimony yesterday did you then have, at that time, during the time of your testimony yesterday, did you at that time have any recollection of having worked in the boiler pit excavation? A. No.

Q. After hearing the testimony of Mr. Sayler, did that refresh your recollection of having worked in the boiler pit excavation?

A. Excuse me. I think it was Mr. Tucker who said——

Q. (Interrupting) Mr. Tucker. You are right, sir. I stand corrected. Did Mr. Tucker's testimony prompt or refresh your recollection of having worked in the boiler pit excavation? A. No.

(Testimony of Richard Kieburtz.)

Q. Did you since last evening make an inspection of the premises to ascertain the location of the boiler pit excavation? A. I did.

Q. Will you tell the trial examiner where it is?

A. It's there's two boiler pit excavations, about in the middle of the boiler room. And the boiler room is also set in an excavation, about four feet deep, that, the floor of the boiler room, that is, is about four feet below ground level and the floor of the boiler pits are about three feet below that.

Q. My first question of you was, did you ever work in the boiler pit excavation? [253]

A. No.

Q. An excavation three feet wide and 12 feet long? A. No.

Q. Did you ever do any work in relation to the excavation for the footings for the boiler room?

A. Yes.

Q. When, in the course of your three days work was it that you worked, was it that you worked on the boiler room footings excavation?

A. On the first day.

Q. That was your first day's assignment?

A. Yes.

Q. Did Sam also work on the boiler room footings excavation during that first day?

A. He did.

Q. Now, with reference to the boiler room excavation, which side did you work on, which side did Sam work on, during the first day?

A. I worked on the east side and he worked on

(Testimony of Richard Kieburztz.)

the west side. I also worked on the south and he worked on the north.

Q. Do you know of a building there to which he refers to as the gymnasium? A. Yes.

Q. Did you work on footings, excavations for footings on the gymnasium? [254] A. Yes.

Q. On which side of the gymnasium was it that he worked and on which side of the gymnasium was it that you worked, in doing the work in the excavation for the footings?

A. He worked on the east side and I worked on the west side.

Q. That is, as he has testified to here today?

A. That is right.

Q. Your recollection is, is that, is just the change in the date sequence of the work, in relation to his own testimony? A. Yes.

Q. But you did no work on the boiler room pit excavation at all? A. Right.

Q. During the course of Mr. Sayler's testimony, he referred to a situation where he came back and took a board and showed you how to clean out the pier footings. You testified yesterday as to what transpired, but specifically, did he take a board and show you how to scrape the pier footings? A. No.

Q. Immediately prior to the incident of him coming to talk with you about cleaning out the pier footings, did he talk with you about cleaning out the pier footings? A. Yes.

Q. But he did not use a board to show you?

A. No.

(Testimony of Richard Kieburtz.)

Q. What had transpired immediately prior to that?

A. The concrete inspector had come by where I was working on one of the, backfilling around one of the forms for the pier footings, and he took his rule and measured the depth of it and mentioned that it was not deep enough and then he went off to talk to Mr. Sayler.

Q. And it was immediately after that that Mr. Sayler came to you, then, and gave you a measured stick and told you to make sure that they were that deep?

A. Yes. [256]

* * * * *

Mr. Boyd: That is all. The General Counsel rests. [257]

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 2

Labor Agreement

November 3, 1950

1. This Agreement made and entered into, in duplicate, this 3rd day of November, 1950, by and between Associated General Contractors of America, Seattle Chapter, Inc., by and through Seattle Construction Council, affiliate members thereof, acting collectively and severally for all of its members, employers of craftsmen and labor, Party of the First Part, and Seattle Building and Construction Trades Council, Party of the Second Part, acting collectively and severally for all of their members, as follows:

2. Desiring to insure the continuance of the amicable relations now existing between the building trades craftsmen of Seattle and their employers, both parties hereto mutually agree to maintain all wages in the sub-joined wage scale and the working conditions of the Seattle Building Trades Council as set forth in this contract.

* * * * *

4. * * * * *

(g) Paragraph 4 of this agreement shall remain in effect unless notice is given ninety (90) days prior to July 1 of any given year, provided, however, that such notice and any determinations made pursuant thereto shall not affect wages already in effect for the balance of such year. Paragraph 4 of this agreement shall automatically be renewed from year to year thereafter in the absence of such notice, provided that the wages shall be adjusted from time to time as provided for in paragraph 4.

(h) All other conditions of this agreement shall continue in effect from year to year until changed by the mutual agreement of the parties as provided herein.

(i) Proposed changes or modifications of this agreement shall be made by either party giving notice thereof in writing to the other party at least 90 days before July 1st, and such notice shall specify the provisions desired to be changed and shall state the time and place at which negotiations may commence. The other party shall enter into negotiations not later than 30 days from the date of the receipt

of said notice, after party has notified the other in writing of proposed modifications and changes in the agreement. In the event no accord can be reached in the succeeding 60 days arbitration, as provided hereinafter, shall be resorted to.

* * * * *

9. It is further agreed that all members of the Party of the First Part hiring employees will employ none other than members of the Party of the Second Part, as enumerated in Schedule "A" attached hereto entitled "Wage Scale".

(a) The Party of the Second Part agrees that it will require all employers, whether members of the Party of the First Part or not, to meet the conditions of Sections 7, 8 and 9 of this agreement, and further to register and comply with the State Workmen's Compensation Act, the State Business or Occupation Tax Act, the State and Federal Social Security Acts and the State Unemployment Tax Act before the Party of the Second Part will furnish men to such employer. It shall be the responsibility of the Party of the Second Part, to the best of its ability, to enforce a Union condition on all construction within the jurisdiction of said party as defined in Paragraph 3.

(b) It is further agreed that the Second Party will make no separate, other or different labor, wage, rules or conditions or working agreement or agreements with any member of the First Party without the written approval and consent of the First Party.

(c) It is mutually agreed by the parties hereto

that should any member of either party resign from or forfeit, or otherwise lose his membership in the Seattle Construction Council or Seattle Building and Construction Trades Council, the party of which he was a member shall be relieved of all responsibility under this contract as applied to such member after date of resignation or membership forfeiture. The Party of the Second Part agrees to grant no privileges, terms, or conditions of employment more advantageous than those outlined in this agreement to other similar employers within the area covered by this agreement.

(d) In consideration of the terms and covenants of this agreement, the Party of the Second Part agrees that in the event of there being a shortage of men available for work covered by this agreement the Party of the Second Part shall give requirements for men of the members of the Party of the First Part preference over the requirements of contractors and builders who are not members of the Party of the First Part.

* * * * *

11. If any section, subsection, clause, sentence or phrase of this agreement is, for any reason, held to be repugnant to or in conflict with or in violation of the Labor-Management Relations Act of 1947, otherwise known as the Taft-Hartley Labor Act, being 29 U.S.C., 141 et seq., such repugnancy, conflict or violation shall not affect the validity of the remaining portions of this agreement, and all portions thereof not repugnant to or in conflict with or in violation

of said Labor-Management Relations Act of 1947 shall be enforced and abided by as herein written.

In Witness Whereof the parties hereto have hereunto affixed their hands and seals the day and year first hereinabove written.

Seattle Building and Construction Trades
Council

By Wm. L. Kuithe—Ironworkers #86
Clyde Fenn—Roofers #54
R. Buchanan—Bldg. Laborers #242
J. R. Warren—Painters #300, 1105,
#32, #435
W. P. Uhlman—Pile Drivers #2396
A. D. Loreman—Sheet Metal #99
Wm. L. Haivala—Cement Finisher #528
Harry L. Carr—Dist. C of Carpenters

Associated General Contractors of America,
Seattle Chapter, Inc.

By and Through
Seattle Construction Council
By Cliff Mortensen
Geo. E. Teufel
R. B. Lane
Oscar Sundberg
E. B. Hickok

CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the 19th Region in the matter of E. F. Shuck Construc-

tion Co., Inc., were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY,
Official Reporters

/s/ By VERNON V. KELLER,
Field Reporter

[Title of Board and Cause.]

TRANSCRIPT OF PROCEEDINGS

Room 407-G, United States Courthouse Building,
Seattle, Washington, Friday, March 4, 1955.

Pursuant to notice, the above-entitled matter came on for hearing at 9:30 o'clock, a.m.

Before: Martin S. Bennett, Esq., Trial Examiner.

Appearances: Melton Boyd, Esq., 407 U. S. Courthouse, Seattle, Washington, appearing on behalf of counsel for General Counsel.

Lyle Iversen, Esq., of the firm of Lycette, Diamond & Sylvester, 800 Hoge Building, Seattle, Washington, [1*] appearing on behalf of the Seattle Chapter of The Associated General Contractors of America and The Seattle Construction Council.

Arthur S. Quigley, Esq., of the firm of Croson, Johnson & Wheelon, 900 Insurance Building, Seattle, Washington, appearing on behalf of the Witness Shuck and the Witness Berg.

Roy E. Jackson, Esq., 1207 American Building, Seattle, Washington, appearing on behalf of Hod

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Carriers, Building and Common Laborers Union,
Local No. 242, A. F. L. [2]

Proceedings

Trial Examiner: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of E. F. Shuck Construction Company, Inc., The Associated General Contractors of America, Seattle Chapter, Inc., The Seattle Construction Council, case 19-CA-851 and 19-CB-261. I believe another respondent in the matter is Hod Carriers, Building and Common Laborers Union, Local No. 242, A. F. L.

This is actually a remand hearing, and I will go into more detail on that in a moment.

The Trial Examiner conducting this hearing is Martin S. Bennett.

I will ask counsel and other representatives for the parties to state their appearances for the record.

Mr. Iversen: My name is Lyle Iversen, of the firm of Lycette, Diamond & Sylvester, and I represent the Seattle Chapter of The Associated General Contractors of America and their affiliate, The Seattle Construction Council.

I would like to state for the record that they are the same thing.

Trial Examiner: Would you give the reporter your address as well?

Mr. Iversen: My address is 800 Hoge Building, Seattle.

Trial Examiner: For the General Counsel. [4]

Mr. Boyd: Melton Boyd, attorney, counsel for

the General Counsel. My address is 407 U. S. Courthouse, Seattle, Washington.

May I make this observation before passing. The gentlemen who are identifying themselves as counsel today are counsel who appeared in the original hearing in this case, which opened before Trial Examiner Wallace E. Royster on October 29 of 1953. There was on that occasion one other gentleman present, Mr. Carl Croson, who was an associate with Mr. Arthur Quigley and who since has passed away.

Trial Examiner: I gather, then, that several other appearances ought to be made.

Mr. Quigley: I am Arthur S. Quigley, improperly shown in the record as Arthur G. Quigley, a partner of Croson, Johnson & Wheelon, representing the witness Shuck and the witness Berg at this hearing. I have questioned, there being no appeal, that I am appearing for the Shuck Company at this hearing.

Mr. Boyd: Do I understand—may I take up the inquiry?

Trial Examiner: Yes.

Mr. Boyd (continuing): —do I understand the Shuck Construction Company does not wish to make an appearance as a respondent in this re-opened hearing? As I see it, there is no prejudice to your taking one position or the other, but so our record will be clear and we will understand what you want to do I have framed the question to which you could make a response and perhaps clarify your position.

Mr. Quigley: What is your position to be, Mr. Jackson?

Mr. Jackson: Well, I would take the position that we appear here as representing the respondent. I would take that position.

Trial Examiner: Perhaps we had better have your appearance for the record.

Mr. Jackson: Roy E. Jackson, 1207 American Building, appearing in behalf of Hod Carriers, Building and Common Laborers Union, Local No. 242, A. F. L.

Mr. Boyd: For the information of the Trial Examiner, since we have this much on the record, let me fill in some information that is shown on the original record in this case.

Originally, Mr. Quigley, along with Mr. Croson, appeared as counsel for the Shuck Construction Company, a respondent in the proceeding, and originally Mr. Jackson appeared for the Common Laborers Local, which was a respondent in the proceeding originally conducted before Trial Examiner Royster in 1953.

Trial Examiner: I have before me the order remanding the proceeding for further hearing, and the only issue before us at this time, as stated by the Board in its order remanding the proceeding—said order being dated February 9, 1955—is that “a further hearing be held before a Trial Examiner for the purpose of obtaining additional commerce data.”

Just so there will be no doubt about it, that is the only issue before us at this time, as I see it. [6]

* * * * *

Trial Examiner: While we are talking about that I might note for the record one minor inaccuracy in

the order. At least I am advised it is an inaccuracy. The order states that respondent union, namely, the Hod Carriers Local, filed exceptions on February 5, 1954, to the original intermediate report. I am advised that the exceptions were filed only by the A. G. C.

Mr. Boyd: And The Seattle Construction Council.

Trial Examiner: And The Seattle Construction Council, rather than respondent union. I don't think that will affect the matter here before me at all, however. [8]

* * * * *

Trial Examiner: Let's put the other transcript and record aside for a moment.

As I see the issues before me at the moment, it is the burden of counsel to establish that the operations of these respondents falls within the Board's jurisdictional policies. That is the issue with which the respondents are being confronted here today, and there isn't any other one.

Mr. Boyd: In the original hearing documents put in evidence were numbered from 1 through 5, inclusive, being General Counsel's Exhibits 1 through 5, inclusive. Further exhibits to be offered today by the General Counsel will relate to that number.

General Counsel's Exhibit No. 1 was the original formal file containing the formal papers upon which the issues in the case were made.

At this time I wish to present in this record as a supplement to General Counsel's Exhibit No. 1 that which will be marked No. 1 Part 2.

Trial Examiner: What do you mean? What is Part 1 and Part 2?

Mr. Boyd: And composed of the following documents: [11]

The Board's order remanding proceeding to Regional Director for further hearing, dated February 9, 1955; the order and notice of further hearing, issued by the Regional Director on February 21, 1955; and the affidavit of service of order and notice of further hearing, showing service of these documents upon each of the respondents, with courtesy copies to their counsel, being an affidavit dated February 21, 1955, to which is attached the registry return receipts showing service by registered mail.

(Thereupon the documents above referred to were marked General Counsel's Exhibit No. 1 Part 2 for identification.)

Mr. Boyd: I offer in evidence that which is now marked for identification General Counsel's Exhibit 1 Part 2.

Mr. Iversen: I wish to register for the record the fact that the error that has previously been referred to appears in the order of February 9, 1955, namely, the recital that the exceptions were filed by the union whereas they were filed by The Associated General Contractors.

Trial Examiner: I believe we are all in agreement on that.

Mr. Boyd: Yes. The Trial Examiner, as I understand it, has already remarked on this record that that was an error and the Board's order should have recited that the exceptions were filed not by the re-

spondent union but by the respondent A.G.C. and Seattle Construction Trades Council. [12]

* * * * *

Trial Examiner: That is right, I am not foreclosing anyone from filing exceptions to my intermediate report.

I think all parties have the right to file exceptions to my supplemental intermediate report which will treat with the commerce question. I don't think that the substantive unfair labor practices are open for the filing of exceptions at this time. If the parties feel that they are, I suggest that they do so. I just don't think they are in standing to do it, and it may be that the Board will agree with them.

I am going to modify my prior ruling to that extent. I am not foreclosing any counsel from filing additional exceptions at this time to the substantive unfair labor practices. I don't think they have standing to do so, but if they feel that they have that right I am not foreclosing them. At such time as they file exceptions to my supplemental intermediate report I suggest that they protect themselves by doing accordingly. This is not to be construed as an authorization for them to do so.

As I view it, the only thing that is open after I comply with the Board's remand order is the parties, if they feel [16] aggrieved, file exceptions to such subject matter as my supplemental intermediate report may treat with.

All right, will you proceed, Mr. Boyd.

Mr. Boyd: Mr. Harper.

Trial Examiner: I didn't rule on the receipt in

evidence of General Counsel's Exhibit No. 1 part 2.

Is there any objection to the receipt of the three documents?

Mr. Iversen: No objection with the corrections recited.

Trial Examiner: I will receive the proffered documents. [17]

COLTON D. HARPER

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): Mr. Harper, your name is Colton D. Harper? A. Yes.

Q. You are the same Colton D. Harper who was called to testify in the original hearing in this case, which was conducted [17] on October 29 of 1953?

A. Yes.

* * * * *

Q. (By Mr. Boyd): What is your address?

A. 215 West Harrison Street.

Q. That is your business address? A. Yes.

Q. For whom do you work?

A. The Associated General Contractors of America, Seattle Chapter, Inc., and The Seattle Construction Council.

Q. And what is your position with the A. G. C.?

A. Assistant manager.

Q. The A. G. C. has a division of its functions

(Testimony of Colton D. Harper.)

which is known as The Seattle Construction Council? A. Yes.

Trial Examiner: Just what is that division?

The Witness: That is composed of material for houses, subcontracting firms, and generally supply.

Q. (By Mr. Boyd): They are your specialty contractors? [18]

A. Correct.

Q. In distinction to your general contractors, is that correct? A. Yes.

Trial Examiner: They all belong to the Seattle Chapter but the houses which fall into that group are put into The Seattle Construction Council, is that correct?

The Witness: Yes.

Q. (By Mr. Boyd): I hand you that which will be marked for identification General Counsel's Exhibit No. 6.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 6 for identification.)

Q. (By Mr. Boyd): Do you recognize what that is? A. Yes.

Q. Directing your attention to the list of the officials and the list of names as they appear at pages 28, 29, 30, and 31, would you say that that is the roster of the membership of the Seattle Chapter of The Associated General Contractors of America, being the members that are engaged in general construction, heavy construction, and highway construction?

(Testimony of Colton D. Harper.)

A. All with the exception of—no; it would be highway construction if you consider bridges.

Mr. Boyd: Will you read the answer.

(Answer read.)

A. I should have said it would include highway construction. [19]

Q. You have a way of designating after the name of each member the class of construction work in which they are engaged, with symbols "B", "B-Hvy" and "B-H-Hvy"? A. Yes.

Q. "B" stands for building construction?

A. Yes.

Q. "B-Hvy" stands for highway construction, does it not? A. Yes.

Q. And the "B-H-Hvy" abbreviates heavy construction, does it not? A. Yes.

Q. Would you state what is the differentiation between the building, highway, and heavy classifications of your membership?

A. Those who engage in building construction are the contractors who build structures to house persons or equipment or whatever it may be, and on highway construction, as it is used here, the letter "h" does include bridges. It does include bridges. Although I don't believe we have a highway constructor as such in the organization who would do paving or grading of a highway. And the heavy construction has to do with such as tunnels, docks, wharves, and the more heavier type of construction. That is the term as we define it.

Q. Very well. Now directing your attention fur-

(Testimony of Colton D. Harper.)

ther to the list of names of members as they appear, beginning at pages 32, [20] continuing, 33, 34, 35, 36, 37, and through to page 51, in this General Counsel's Exhibit 6, does that list there the members of your organization who are identified with the subdivision of your organization known as The Seattle Construction Council? A. Yes.

Mr. Boyd: I would offer in evidence General Counsel's Exhibit 6.

Mr. Iversen: No objection.

Trial Examiner: It may be received.

(The document heretofore marked General Counsel's Exhibit No. 6 for identification was received in evidence.)

[See page 249.]

Q. (By Mr. Boyd): Included within the membership of the Seattle Chapter of A. G. C. and identified as a member engaged in building construction work you have the firm of E. F. Shuck Construction Company? A. Yes.

Q. Which is the other respondent in this proceeding.

Mr. Harper, in a round figure, which is approximately correct, however, what is the total dollar volume of construction work performed annually or that was performed in the year of 1953 by all members——

Mr. Iversen: I object to the question.

Q. (By Mr. Boyd—continuing): of the Seattle Chapter of The Associated General Contractors of America? [21]

(Testimony of Colton D. Harper.)

* * * * *

A. I do not know.

Q. (By Mr. Boyd): Well, can you state, with dependable information, that it did exceed one hundred million dollars in 1953?

A. No, I couldn't. [22]

Q. What was the basis of your giving that information, then, to field examiner McFeely last week?

A. That it exceeded one hundred million dollars?

Mr. Iversen: I object to counsel cross-examining his own witness.

Mr. Boyd: I would state the witness is called under Rule 43 (b) as managing agent of respondent.

Trial Examiner: All right, I will go along with you on that.

You are being asked in effect if you gave a statement to that effect to a board field examiner last week.

A. Oh, I told him, to the best of my knowledge and my memory, that I would presume so. I didn't give him a definite statement. I have no way of determining that.

Trial Examiner: Do you still presume so?

The Witness: Yes, I would presume so, that it would exceed one hundred million dollars. [23]

* * * * *

Q. (By Mr. Boyd): Mr. Harper, does your Seattle Chapter of A. G. C. or did it in 1953 pursue

(Testimony of Colton D. Harper.)

the practice of notifying its members of contracts to be let in the construction field in the State of Washington and also in the Territory of Alaska?

A. Yes.

Q. You did that systematically? A. Yes.

Q. Did you provide your members with follow-up information as to the contracts that were let?

A. Yes.

Q. Both in the State of Washington and nearby adjoining states and also in the Territory of Alaska?

A. Yes.

Q. Did you systematically inform your members as to which of those contracts were let to members of the Seattle Chapter of the A. G. C.?

A. Would you restate the question, please?

(Question read.)

A. Yes.

Q. Now, based upon that information, which you were systematically assembling and putting out to your membership, taking [24] notice of the dollar volume of contracts being let to members of the Seattle Chapter of the A. G. C., would you state whether the dollar volume of construction work performed by members of the Seattle Chapter of the A.G.C. during the year of 1953 approximated one hundred million dollars? * * * * *

A. Based on these records that we—the systematic reporting that you are speaking of, we do the systematic reporting, but we do not keep a total of dollar volume, and I couldn't, I just couldn't, say.

(Testimony of Colton D. Harper.)

I just thought of something that was part of the basis of my statement to Mr. McFeely. I did happen to think of one job that was a forty million dollar job that one contractor had.

Q. (By Mr. Boyd): In that particular year?

A. Which I can readily see would have in that particular year made the one hundred million dollars.

Trial Examiner: Where was that job?

The Witness: That was in Ketchikan, Alaska.

* * * * *

Trial Examiner: I will deny the motion.

You said this forty million dollar job was in 1953?

The Witness: Yes.

Trial Examiner: And that was performed by one of the members of the A.G.C.?

The Witness: Yes.

Trial Examiner: Which company was that?

The Witness: Howard S. Wright.

Q. (By Mr. Boyd): And you said further that the job that was [26] accomplished was performed in Ketchikan, Alaska? A. Yes.

Q. That brings a second point up. Is a substantial part, was a substantial part, of the total work done in the year of 1953 by members of the A.G.C. done in states and territories of the United States outside the State of Washington?

* * * * *

Q. (By Mr. Boyd): Understanding I mean the Seattle Chapter of the A.G.C.

(Testimony of Colton D. Harper.)

A. I would say that a substantial portion and perhaps 50 per [27] cent of our members definitely was.

Q. Were performing work outside the State of Washington? A. Yes.

Q. In states other than Washington or in the Territory of Alaska? A. Yes.

* * * * *

Q. (By Mr. Boyd): And the further point, to restate the question, was a substantial portion of this total work done by, construction work done by, members of your Seattle Chapter done under direct contract with the United States Government in the construction of defense facilities?

A. Yes.

Q. Both within the State of Washington and also in nearby states and in the Territory of Alaska?

A. Yes. [28]

* * * * *

Q. (By Mr. Boyd): May I ask you, then, Mr. Harper, approximately what percentage of the gross amount of work that was done in 1953 which was done by your members was work accomplished outside the State of Washington?

A. That is a very difficult question. I don't even know how to go about arriving at that. I don't have a criteria of any kind to determine that.

Trial Examiner: I thought he said that 50 per cent of their work was done outside of the state.

Mr. Boyd: He said 50 per cent of the membership did work outside the State of Washington,

(Testimony of Colton D. Harper.)

but the dollar volume wouldn't be reflected by that.

Q. (By Mr. Boyd): Would you say that at least 10 per cent of the gross amount of work done in 1953 was done by your members outside the State of Washington, being in nearby adjoining states or in the Territory of Alaska? [29]

* * * * *

A. Yes.

Q. (By Mr. Boyd): At least 10 per cent of it would be done outside the State of Washington?

A. Yes.

Q. Which would mean at least ten million dollars would have been done in '53 outside the State of Washington? In fact, there is one item of forty million dollars was done in the Territory of Alaska?

A. Yes.

Mr. Boyd: Which he recited.

Trial Examiner: If you had a forty million dollar item in Alaska at that year and the work outside of the state was approximately 10 per cent of the total, wouldn't the annual volume of all the contractors be at least four hundred million?

Q. (By Mr. Boyd): Are you in a position to state?

A. I would say no, because forty million dollar jobs don't come up every day. Those are exceptions.

Trial Examiner: We are talking about 1953 now.

The Witness: Even in 1953 because that was decidedly——

(Testimony of Colton D. Harper.)

Q. (By Mr. Boyd — interrupting): Normally you would say, year in and year out you would say, that at least 10 er cent of the work of your membership is done outside the State of Washington?

A. Yes.

Q. Would you say normally year in and year out the dollar volume of work done by your members would exceed a hundred million dollars?

Mr. Iversen: The same objection.

Q. (By Mr. Boyd): In its entirety, both within the State of Washington and outside the state?

* * * * *

A. Yes.

* * * * *

Q. (By Mr. Boyd): With respect to construction work [31] accomplished in 1953 within the State of Washington and by members of your Seattle Chapter, excluding for the moment Shuck Construction Company, was work done by individual members in that year done for the United States Government under direct contract with the government?

A. Yes.

Q. You had supplied Mr. McFeely with certain items of 1953, which I would read and have you state whether it is your recollection that this work was accomplished within 1953 by your members and within the State of Washington.

* * * * *

Q. (By Mr. Boyd): The construction of powder magazines at Bangor, Washington, for the United States Navy, in the dollar amount of a

(Testimony of Colton D. Harper.)

million three hundred ninety-seven thousand dollars. A. Yes.

Q. And the construction of a boat storage plant for the United States Navy in the amount of \$1,-321,000. A. Yes.

Trial Examiner: This is construction by unidentified members of the Seattle Chapter of the A.G.C.?

Mr. Boyd: This is construction by unidentified members of the Seattle Chapter of the A.G.C. but not Shuck.

Trial Examiner: Unidentified members of the Seattle Chapter of the A.G.C. but not Shuck? [32]

Mr. Boyd: That is right.

Trial Examiner: All right.

Q. (By Mr. Boyd): The construction of radio transmitter for the United States Navy at the cost of \$13,000? A. Yes.

Q. The construction of ammunition and storage area at Fort Lewis for the United States Army in the amount of \$57,000? A. Yes.

Q. Construction of transmitter facilities at Richland, Washington, for the Atomic Energy Commission in the amount of \$473,000?

A. Yes.

Q. And the construction of Phase Two of the transmitter facilities at Richland, Washington, for the Atomic Energy Commission in the amount of \$1,278,000? A. Yes.

Q. In addition to that and apart from those figures and still excluding from your testimony any reference to Shuck, did members of the Seattle

(Testimony of Colton D. Harper.)

Chapter perform construction work valued in excess of \$200,000 in the year of 1953 for freight transportation companies such as the Northern Pacific Railroad and the Seattle-Los Angeles Motor Freight Express, Inc.?

* * * * *

A. Yes. [33]

Q. (By Mr. Boyd): And in addition was construction work in excess of \$200,000 done by members of the Seattle Chapter of A.G.C. in 1953 for the Pacific Telephone and Telegraph Company, specifically the building constructed by Howard Wright, at a construction cost of two million dollars?

A. Yes.

Q. Pacific Telephone and Telegraph Company is the public utility company providing telephone service in the Pacific Northwest and beyond the State of Washington, is it not?

* * * * *

A. Yes.

Q. (By Mr. Boyd): In addition to that, did some one of your members in 1953, specifically General Construction Company, construct a terminal facility known as Pier 1 for the Port of Everett at a cost of approximately \$382,000?

* * * * *

A. Yes. [34]

* * * * *

Q. (By Mr. Boyd): This Port of Everett, to which we just made reference in the testimony, is a public sea port operated on the water front in

(Testimony of Colton D. Harper.)

the City of Everett and on the Puget Sound, is it not? A. Yes.

Q. And this terminal facility that was being constructed at the time was a part of the trans-shipment facilities of that public port? A. Yes.

Q. Could you state dependably, too, Mr. Harper, that in the year of 1953 employer members of the Seattle Chapter engaged in other construction work valued in excess of \$200,000 performed for individual firms which themselves manufacture goods that are sold and delivered to destinations outside the State of Washington in excess of \$50,000 annually? A. Yes. [35]

* * * * *

Cross Examination

Q. (By Mr. Iversen): Mr. Harper, what type of organization with respect to whether it is a corporation or association or what it is is the Seattle Chapter of A.G.C.?

A. The primary functions of the Seattle Chapter—

Q. (Interrupting) No. I am asking you what kind of organization it is, with respect to whether it is a partnership, corporation—

A. (Interrupting) Oh, I see. I beg your pardon. It is a corporation. [36]

* * * * *

Trial Examiner: Is it a correct statement to say, and correct me if I am in error, that the prime purpose of the A.G.C. and its divisions in

(Testimony of Colton D. Harper.)

Seattle is to represent its members and to look after the interests of its members?

The Witness: Yes. [37]

* * * * *

Q. (By Mr. Iversen): How does one cease to become a member of the Seattle Chapter of A.G.C.?

A. By filing a letter of resignation which again is taken before the Board and approved.

Q. Do you have a changing membership, people coming in and people going out? A. Yes. [38]

* * * * *

Q. In the year that we have under consideration, 1953, was E. F. Shuck Construction Company, Inc., a member of your chapter? I am talking now about E. F. Shuck Construction Company, Inc.

A. I believe E. F. Shuck was a member as E. F. Shuck at that time.

Trial Examiner: He was a member of what, now?

The Witness: Of The Associated General Contractors, Seattle Chapter.

Trial Examiner: In 1953?

The Witness: In 1953. [39]

* * * * *

Trial Examiner: Are you contending that the E. F. Shuck Company was not a member of the A.G.C.?

The Witness: No, I am not contending that at all. The only contention I have is that Mr. Shuck is carried on our membership rolls as E. F. Shuck.

(Testimony of Colton D. Harper.)

Q. (By Mr. Iversen): As an individual, is that right?

Trial Examiner: How do the membership rolls carry them, as a company or a corporation or what?

The Witness: No; they carry it as E. F. Shuck.

Q. (By Mr. Iversen): Are your membership rolls carried the same way as the roster shows?

A. Yes. [40]

* * * * *

Q. Did the Seattle Chapter, A.G.C., act as a hiring agent for any of the persons who worked on the job in question? A. No.

Q. Did the Seattle Chapter, A.G.C., have any contractual relations whatsoever with any persons who worked on that job? [43]

* * * * *

Q. (By Mr. Iversen): Take it first from any individual employees.

A. No, not as such.

Q. Did you have any contractual relations with the employer [44] on that job? A. No.

Trial Examiner: Did you bargain in behalf of that employer?

The Witness: Yes.

Trial Examiner: And that is the association-wide contract?

The Witness: Yes.

Q. (By Mr. Boyd): When you say you had no contractual relations with the employer, I think you may misspeak yourself. In so far as contractual relations of the employer involved, you had relations to the extent of membership, did you not?

(Testimony of Colton D. Harper.)

A. Yes.

Q. As to contractual relation as to membership, you had no other contractual relationship with the employer on the job, did you?

A. That is correct. [45]

* * * * *

TOR BERG

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): Your name is Mr. Tor Berg?

A. Tor Berg, that is right.

Q. By whom are you employed?

A. By the E. F. Shuck Construction Company.

Q. And in what capacity?

A. I am the accountant for the firm. [47]

* * * * *

Q. (By Mr. Boyd): Mr. Berg, in gross amount is it [48] approximately correct to state that the Shuck Construction Company's construction work performed in the year of 1952 approximated \$872,000?

A. That's correct, yes.

Q. And in the year of 1953 it approximated \$879,000?

A. That's correct.

Q. Now, within the year of 1952 and as a part of that gross amount in that year did the Shuck Construction Company perform construction work for the Port of Seattle in the construction of its

(Testimony of Tor Berg.)

transient shed No. 6 at Pier 20 at a cost of about \$92,679.76?

* * * * *

Q. (By Mr. Boyd): Now, in the year of 1953.

A. To my knowledge the company built this transient shed in 1952.

Trial Examiner: For the indicated price?

The Witness: Yes. [49]

Q. (By Mr. Boyd): And in the year of 1953 did the same company build for the same Port of Seattle or rather perform alteration work on building, I believe, C-9, at the Salmon Bay terminal at a cost of \$13,363.21?

A. That is correct, yes. [50]

* * * * *

Q. (By Mr. Boyd): Mr. Berg, with reference to other construction work done by the company in 1952 and 1953, in 1952 did not the Shuck Company perform construction work at a cost of about \$10,453.53 for the Los Angeles-Seattle Motor Express, Inc.?

A. That's correct. [52]

* * * * *

Mr. Boyd: Can it be stipulated that the Los Angeles-Seattle Motor Express, Inc., is the name of a company that operates motor freight lines between the states of Washington and California? [56]

* * * * *

Mr. Jackson: It would appear to me we should be able to stipulate as to Los Angeles-Seattle Motor Express. We are dealing with that every day. We

(Testimony of Tor Berg.)

appreciate it operates back and forth. I don't see any necessity of carrying out a long dissertation on a question of that kind.

Mr. Quigley: If other counsel have any personal knowledge of any of these, I will go along.

Mr. Jackson: I think we will agree to that, as to Los Angeles-Seattle Motor Express.

Mr. Iversen: I will say I won't object to it; I will assume that it is correct.

Mr. Jackson: With the reservation that it is immaterial.

Mr. Iversen: Yes.

* * * * *

Q. (By Mr. Boyd): Mr. Berg, in the year of 1952 did Shuck [57] Company additionally complete construction work at a cost of \$12,437.20 for the Department of Lighting for the City of Seattle, a local public utility company?

A. That is correct, yes.

Q. And in the year of '52 did it additionally complete work for various firms, and I specify, Sears, Roebuck & Company, Joseph T. Ryerson & Son, Inc., Monsanto Chemical Company, and J. C. Penney Company, the amounts being done for them as follows:

For Sears, Roebuck, one job \$7,751.94, another job \$1,028.49, another job \$1,087.75, another job \$2,233.39;

For Joseph T. Ryerson & Son, one job \$2,932.85, another job \$234.26, another job \$2,957.15——

* * * * *

(Testimony of Tor Berg.)

Q. (By Mr. Boyd—continuing): —and still a further job for Ryerson in the amount of \$1,566.74, and for Monsanto Chemical Company a series of jobs, one of which was \$125.71, another one \$49.85, another one \$46,922.91, another one \$967.17, and another one \$193.60, and for the Equitable Life Assurance Society in the amount of, one job in the amount of, \$10,433.90, another one in the amount of \$3,924.89; those being construction items performed in 1952 for the companies named? [58]

A. Can I answer it this way, that if those figures that you read to me are the same as those that Mr. McFeely copied off of this list or the job cost ledger, if they are, then that is correct.

Q. These figures which I have been reading are the figures taken off your own records by Mr. McFeely and in your own presence?

A. Yes. [59]

* * * * *

Q. (By Mr. Boyd): Excluding the figure that I gave you of Equitable Life Assurance Society of \$10,433.90, for which you did not find a corresponding figure on your record, were all the remaining figures which I gave you figures which show up on your records of work done in 1952 by Shuck for those companies as indicated?

A. That's right, yes. And I may say that they include Washington State sales tax, if it matters. I mean those figures include the three per cent sales tax, if it means or makes a difference.

(Testimony of Tor Berg.)

Trial Examiner: You are just striking the reference to the Equitable job?

Mr. Boyd: The reference to that one Equitable job, which was given as \$10,433.90. I do not find a corresponding figure for and move that that be stricken from the question put to the witness. [60]

* * * * *

Q. (By Mr. Boyd): With reference to the year of 1953 you stated at the outset of your testimony that the gross amount of construction work of the Shuck Company was around \$879,000?

A. That is correct.

Q. Within that period of 1953 you previously testified that there was \$13,363 worth of work done for the Port of Seattle at the Salmon Bay terminal?

A. Yes.

Q. With reference to other work done in the year of 1953 do you have a record showing the work done under contract directly with the United States Government for the construction of defense installations, specifically the United States Navy, in the alteration of its building at Pier 91, the United States Veterans Administration Hospital, and also for the General Services Administration for work done in the Federal Office Building? A. Yes.

Q. Will you refer to your records in respect to those three items? [61]

A. The first one, though, four hundred fifty-eight twenty-nine, is only a small part of the total job. This (indicating) is the part that was completed in

(Testimony of Tor Berg.)

December of '53, and the remainder of the contract was completed in '54.

Q. You are speaking of \$458 worth in 1953 for alterations to buildings at U. S. Navy Pier 91?

A. Yes.

Trial Examiner: How much was the entire contract?

The Witness: It was eleven thousand nine hundred ten or thereabouts.

Trial Examiner: The remainder was done in 1954?

The Witness: It was started in the middle of December 1953.

Q. (By Mr. Boyd): With reference to the United States Veterans Administration Hospital you did in 1953, seventeen thousand——

A. (Interrupting): That was a lump sum contract.

Q. In addition to that you did this additional work for the General Services Administration Federal Office Building in the sum of \$1,846 in 1953?

A. Correct.

Q. Some few items I would have you check with reference to work done in 1953, for other firms whose names I shall supply you, was work done for General Electric Company in 1953?

A. That's right, yes. [62]

Q. You have reference there to work accomplished under contract in the total amount of approximately \$13,477.90? I don't have the job number.

(Testimony of Tor Berg.)

A. Let me see now; I can't remember the job number now either.

Q. Is that figure approximately correct?

A. Yes, we might say that.

Q. Did you do in 1953 a number of small jobs for the Monsanto Chemical Company that would have approximated about at least \$10,000 in work—oh, no, that overstates it—approximated \$5,000 in work?

A. Based on this summary here (indicating)——

Trial Examiner: No, I don't want you to rely on the summary; I want you to rely on your own familiarity of the records or inspection of the records.

A. Without looking up each individual job I can say that they probably did around \$5,000 for Monsanto. [63]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Iversen): Did you have some jobs conducted by the Shuck Construction [66] Company, Inc., and some conducted by Mr. Shuck as an individual?

A. To my knowledge the corporation performed the jobs after the company was incorporated.

Q. Were there any of these jobs that you referred to performed by Mr. Shuck as an individual?

A. Not to my knowledge.

Q. Do you know whether or not they were?

Trial Examiner: Let me see if I follow you correctly. Does Mr. Shuck engage in the construction business in two forms?

The Witness: No. He was operating as an indi-

(Testimony of Tor Berg.)

vidual until June 30 of '49, and then the company was incorporated.

Trial Examiner: Subsequent to its incorporation in 1949 has Mr. Shuck engaged in construction business so far as you know only in the corporate form?

The Witness: That is correct.

* * * * *

Redirect Examination

Q. (By Mr. Boyd): The particular job on which Kieburztz was employed, which was the Mercer Island School job, in 1953, was begun, was it not, and concluded in 1954?

A. Yes, it began in 1953 and was concluded in '54.

Q. With respect to the dollar volume of the work done on that job in 1953—with respect to the entire job, the entire contract [67] cost of that job, done in '53 and '54, was approximately \$211,000, was it not?

A. The total amount of the contract was around two hundred eleven thousand, yes.

Q. And the part done in 1953 was approximately \$124,000?

A. If those figures are what I gave Mr. McFeely, then that is correct.

Q. Those are the figures you gave Mr. McFeely.

A. I have no way to answer other than saying that.

Q. Would you say that was approximately correct? A. Yes.

* * * * *

(Testimony of Tor Berg.)

Recross Examination

Q. (By Mr. Iversen): Mr. Berg, that school job was for a local school district, was it not?

Mr. Boyd: I will stipulate it was for the Mercer Island [68] School District, a public school district in the State of Washington.

Does that answer your question?

Q. (By Mr. Iversen): And it was located in the State of Washington? A. Correct.

* * * * *

Trial Examiner: I would like to ask Mr. Harper a question or two.

COLTON D. HARPER

a witness called by and on behalf of General Counsel, after having been previously sworn, was examined and testified further as follows:

Trial Examiner: Did you say how long you had been with A. G. C. here in Seattle? [69]

The Witness: No. I started October 1, 1950.

Trial Examiner: As I understood an answer you gave this morning, I believe in reply to a question of mine, Seattle Chapter of the A. G. C. engages in collective bargaining and signs contracts for all its members, is that correct?

The Witness: Correct, yes.

Trial Examiner: Has that been true since you have been employed by them?

The Witness: Yes.

Trial Examiner: Does that specifically include Shuck Construction Company?

(Testimony of Colton D. Harper.)

The Witness: Yes, I would say in their behalf.

Mr. Iversen: I wonder if the witness understood that question. I think there was a sleeper in that question.

Trial Examiner: I didn't intend it.

Mr. Iversen: Because the question assumed that that was Shuck Construction Company. I assume that you mean by that incorporated.

Trial Examiner: The corporation, yes.

Let's clarify that, whether it included the corporation or otherwise.

Mr. Iversen: I think the question also indicated that was a member and I think that had better be cleared up so the witness understands what he is talking about.

The Witness: Our negotiations are carried on in behalf [70] of the members of the Association, and in this case I would say that we were negotiating on behalf of E. F. Shuck, since we do not have E. F. Shuck Construction Company, Inc., as a member. Let me clarify that a little further. We have construction companies who are constantly incorporating or dissolving or forming partnerships or joint ventures, and they in turn request that these different names be allowed as a member. These requests are by letter, and they do require Board action, and they are in our minutes. In fact, we had two at our last meeting.

Trial Examiner: What is the current status of Shuck so far as you know?

The Witness: So far as I know now, I would

(Testimony of Colton D. Harper.)

have to check my records to be sure of this, so far as I know he is a member as E. F. Shuck, and I don't believe there has ever been this procedural business of changing the name.

Trial Examiner: Perhaps the questions I want to ask, then, should be asked of Mr. Shuck or Mr. Berg. I would like to suspend with this witness temporarily and call back Mr. Berg.

(Witness excused.)

TOR BERG

a witness called by and on behalf of General Counsel, after having been previously sworn, was examined and testified further as follows: [71]

* * * * *

Q. (By Mr. Boyd): As a matter of fact, who is it who pays the membership dues into the membership chapter of A. G. C. on a current basis? I mean the Seattle Chapter of A. G. C.

* * * * *

A. The dues are paid with checks issued by the corporation, that is, corporation checks.

Q. (By Mr. Boyd): How long has that been true?

A. It has been true as long as I have been there.

Trial Examiner: And you have been there since when?

The Witness: Since approximately August 9 of 1952.

Trial Examiner: And these are the dues paid to

(Testimony of Tor Berg.)

the Seattle Chapter of the A. G. C. by Shuck Construction Company? [73]

The Witness: That is right.

Trial Examiner: So far as you know, does Mr. Shuck as an individual pay dues to the Seattle Chapter of the A. G. C.?

The Witness: I do not know whether he does on his own behalf or anything, personal checks or anything like that, but I do know that the dues payments on the gross business has been paid with checks by the corporation.

Trial Examiner: Let me ask you this—I think you have answered this before, but you can straighten me out quickly enough—do you carry on any operations at the Shuck Company in the name of Mr. Shuck as an individual, construction, or otherwise?

The Witness: You mean any——

Trial Examiner: Any construction operation.

The Witness: No; no.

Trial Examiner: So far as you know, is he engaged in any individual business enterprise?

Mr. Boyd: In the construction field.

The Witness: No. [74]

* * * * *

COLTON D. HARPER

a witness called by and on behalf of General Counsel, after having been previously sworn, was examined and testified further as follows:

Redirect Examination

Q. (By Mr. Boyd): Mr. Harper, so that you will not be [76] mis-speaking yourself and in order that it may be of some assistance to you, will you look at your current roster of membership of the A. G. C. As a matter of fact, currently you do carry Shuck in the name of E. F. Shuck Construction Company, isn't that correct?

* * * * *

A. Yes.

Q. (By Mr. Boyd): Do you recall the circumstances under which the membership with respect to Shuck was transferred from E. F. Shuck to E. F. Shuck Construction Company, Inc.?

A. No, I do not recall the circumstances. However, I do believe that had it have been done by the procedure that we have established that I would recall it. [77]

* * * * *

E. F. SHUCK, SR.

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): You are Mr. E. F. Shuck, Sr.?

A. Yes, sir.

(Testimony of E. F. Shuck, Sr.)

Q. And you were called originally as a witness in this proceeding in 1953 but gave very brief testimony? A. Yes.

Q. Mr. Shuck, previous to 1949 was your business incorporated? [79] A. No.

Q. And you did incorporate it in the year of 1949?

A. I believe that date is right.

Q. And from that time on was all the construction business in which you were interested carried on in the name of E. F. Shuck Construction Company? A. That is right.

Trial Examiner: It was the same business continued on in the same manner except that you incorporated in 1949, is that correct?

* * * * *

What I am interested in knowing is this, you have carried on the same business operation irrespective of the fact that you incorporated, is that right?

The Witness: That is true, yes.

Trial Examiner: At the same business location?

The Witness: That is true.

Trial Examiner: The same personnel substantially? [80]

The Witness: Well, of course, substantially, but the personnel——

Trial Examiner: I mean—the actual laborers and craftsmen do change—outside of that is it substantially the same personnel?

The Witness: No, I wouldn't say the same per-

(Testimony of E. F. Shuck, Sr.)

sonnel from then except my son and myself; the other have been changed.

Trial Examiner: Did you carry on the same type of construction after '49 as you did prior to '49?

The Witness: That is right.

Trial Examiner: Next question.

Q. (By Mr. Boyd): Now, Mr. Shuck, you did at one time take membership in the Seattle Chapter of The Associated General Contractors?

A. That's right.

Q. When did you first take membership in it?

A. I do not know.

Q. It was prior to the incorporation of your business? A. I do not know.

Q. It was prior to the——

A. (Interrupting) I cannot answer.

Trial Examiner: You don't know whether it was before or after 1949?

The Witness: I will have to look up records on that. The records will substantiate. [81]

Q. (By Mr. Boyd): At the present time in what name is membership in the association carried?

* * * * *

A. Well, the exact name, I cannot give you that.

* * * * *

Trial Examiner: Are you engaged in the construction business in your own name as an individual?

(Testimony of E. F. Shuck, Sr.)

The Witness: No.

Trial Examiner: When was the last time, if ever, you were [82] so engaged in the construction business as an individual?

The Witness: Prior to incorporation.

Trial Examiner: Next question. I have another question.

Do you pay annual dues to the Seattle Chapter of A. G. C.?

The Witness: No.

Trial Examiner: Does your company do it?

The Witness: Yes.

Trial Examiner: How are those checks signed?

The Witness: By my son mostly.

Trial Examiner: On a corporation check or otherwise?

The Witness: Corporation check.

Trial Examiner: Have you ever submitted dues to the Seattle Chapter of A.G.C. on an individual or personal check?

The Witness: I do not know.

Trial Examiner: Do you customarily pay obligations of the corporation with your personal check?

The Witness: No.

Q. (By Mr. Boyd): Were these dues payments made by the company made as a company expense item of its own?

* * * * *

Q. (By Mr. Boyd): Do you understand the question, Mr. Shuck?

(Testimony of E. F. Shuck, Sr.)

A. It is rather confusing. [83]

Q. Was it paying its own expenses or paying your expenses? Did you reimburse it for the dues which it paid to the Seattle Chapter of A. G. C.?

A. Did I do what?

Q. Did you ever reimburse the corporation for dues which the corporation paid to the Seattle Chapter of A. G. C.?

A. No.

Q. In other words, that which was paid in by the corporation to the Seattle Chapter of A. G. C. was paid as its own expense in the A. G. C., was it not?

A. That is customary, yes.

Mr. Boyd: That is all. I have played with this enough.

Trial Examiner: Do you consider the dues to the Seattle Chapter of A. G. C. as an operating expense of the corporation?

The Witness: I believe that is the way it is handled on our records, yes, sir.

Trial Examiner: Do you make deductions for that on your tax returns?

The Witness: Yes, sir.

Trial Examiner: On your personal tax returns or the corporation's tax returns?

The Witness: It is not on my personal tax returns. [84]

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 6
BUSINESS DIRECTORY

April 1953

(Emblem)

The Associated General Contractors of America,
Seattle Chapter, Inc.

The Seattle Construction Council, Seattle Chap-
ter A.G.C. Affiliate

(Emblem)

Construction Center, 215 W. Harrison, Alder
5433, Seattle 99, Wash.

Seattle Chapter, Inc.
The Associated General
Contractors of America

* * * * *

Membership

* * * * *

Shuck, E. F.—B

535 Pontius Avenue (9).....SE 7993

* * * * *

CERTIFICATE

This is to certify that the attached proceedings
before the National Labor Relations Board for the
19th Region in the matter of: E. F. Shuck Con-
struction Co. were had as therein appears, and that
this is the original transcript thereof for the files
of the Board.

ACME REPORTING COMPANY

Official Reporters

By BERNICE M. JACKSON

Field Reporter

No. 15084

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. F. SHUCK CONSTRUCTION CO., INC.; THE ASSOCIATED
GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAP-
TER, INC.; THE SEATTLE CONSTRUCTION COUNCIL; AND
HOD CARRIERS, BUILDING AND COMMON LABORERS
UNION, LOCAL No. 242, AFL, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

THEOPHIL C. KAMMHOLZ,
General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

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Attorneys,
National Labor Relations Board.

FILED

JUL 30 1956

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AUTHORITIES CITED

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15084

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. F. SHUCK CONSTRUCTION CO., INC.; THE ASSOCIATED
GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER,
INC.; THE SEATTLE CONSTRUCTION COUNCIL; AND
HOD CARRIERS, BUILDING AND COMMON LABORERS
UNION, LOCAL NO. 242, AFL, RESPONDENTS

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*),¹ for enforcement of its order (R. 54-65),² issued on October

¹ The pertinent provisions of the Act are set forth in the Appendix, pp. 24-29.

² References to the printed record are designated "R." Whenever in a series of references a semicolon appears, the references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

28, 1955, against respondents E. F. Schuck Construction Co., Inc. (herein called the Company), The Associated General Contractors of America, Seattle Chapter, Inc. (herein called the AGC), The Seattle Construction Council (herein called the Council), and Hod Carriers, Building and Common Laborers Union, Local No. 242, AFL (herein called the Union). The Board's Decision and Order are reported at 114 NLRB No. 116. This Court has jurisdiction of the proceeding under Section 10 (e) of the Act, the unfair labor practices having occurred at Seattle and Mercer Island, Washington, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

Briefly stated, the Board found that the Company and the Union were operating under a contract negotiated in the Company's behalf by AGC and its constituent body, the Council. The contract contained a union-security provision which gave an illegal preference to union members in respect to hire and retention of employment. The Board concluded that the Company violated Section 8 (a) (1) and (3) of the Act by giving effect to this illegal provision and by discharging employee Richard B. Kieburtz pursuant thereto, and that the Union violated Section 8 (b) (1) (A) and (2) of the Act by likewise giving effect to that provision and thereby causing the Company to discharge Kieburtz. Finally, the Board concluded that inasmuch as AGC and the Council maintained in effect the illegal provision which they had negotiated in behalf of the Company and their other employer-members and inasmuch as the discharge of Kieburtz stemmed from this

provision, AGC and the Council violated Section 8 (a) (1) and (3) of the Act.

A. The identity and business of AGC, the Council, and the Company

AGC is an incorporated association whose membership consists of employers in the Seattle area engaged in the construction of buildings and highways (R. 13, 47; 2, 7, 8, 10, 229, 240). The Council is a division of the AGC, its members being engaged in specialty contracting as distinguished from general contracting (R. 13, 47; 81, 83, 217-220). The AGC and the Council negotiate collective bargaining agreements with trade unions for their members and the members are bound thereby (R. 13, 47; 3, 7, 10, 83-85, 89-90, 108-109, 205-206).

The construction work performed by AGC members is in excess of \$100,000,000 a year, at least 10 percent of which represents work performed outside the State of Washington (R. 47, 56; 220-226). Moreover, during 1953, various members of the AGC engaged in construction work directly involved in the national defense effort, including projects under direct contracts with the United States Government, e.g., construction of a powder magazine for the Navy in the sum of \$1,397,000; a boat storage plant for the Navy in the sum of \$1,321,000; and transmitter facilities for the Atomic Energy Commission in the sum of \$437,000 and \$1,278,000, respectively (R. 48, 56; 224, 226-229).

The Company, a Washington corporation, engages in construction work and has its principal offices in Seattle. A substantial portion of its work is under direct contract with departments or agencies of the United States Government or for employers engaged in inter-

state commerce (R. 13; 2-3, 8, 107-108, 232-239). At all times here relevant, the Company has been represented for collective bargaining purposes by AGC and the Council (R. 48-50, 58, n. 2; 108-109, 230-231, 241-243, 246-248.)³

Upon these facts the Board found that assertion of jurisdiction over the several respondents was proper (R. 13, 47-50, 55-57, 58, n. 2).

B. The unfair labor practices

1. *The illegal union-security provision*

On November 3, 1950, the AGC and the Council, in behalf of their members including the Company, entered into a collective bargaining agreement with the Union, and other building trade unions in the Seattle area (R. 13-14; 82-83, 90, 92, 108-109, 205-209). This agreement, in effect at the time material herein,⁴ provided that none of the employer-members of the AGC and the Council would employ other than members of the Union (R. 13-14; 82-83, 108-109, 207). The practice under this agreement was for the Company to advise the Union of any need for laborers or hod carriers, and these men would then be dispatched from the Union's hall to the construction site, union members

³ The Company was incorporated in 1949, having functioned formerly as an individual enterprise (R. 48-49; 238-239). Until 1955, however, because of failure to request a change in registration, AGC continued to list the Company on its rolls as an individual enterprise (R. 49-50, 58, n. 2; 230-231, 240-241, 244).

⁴ The agreement was of indefinite duration subject to modification by the parties upon appropriate notice at certain specified periods (R. 83-84, 206-207). It appears that, as a result of such notice, the agreement was to terminate on December 31, 1953, as to this Union (R. 83-85).

invariably being dispatched before others (R. 14, 16; 92-95, 99, 104-105).⁵

2. *The discrimination against Richard B. Kieburtz*

a. Events leading to Kieburtz' employment by Company

In June 1953, the Company began work on the construction of several school buildings on Mercer Island, Washington (R. 14; 106, 113-115, 240). In July 1953, Richard B. Kieburtz, a 19-year old student at the University of Washington, sought temporary summer employment as a construction laborer (R. 14; 139-140, 142-145, 174). Learning that his opportunity to find such work would be greater if he were a member of the Union, Kieburtz went to the Union's office and spoke to Robert Buchanan, a business agent for the Union (R. 14; 91, 96, 142-146). Buchanan told Kieburtz that if he found a job the employer was to call the Union for a temporary work permit (R. 14; 97-99, 145-147).⁶

Meanwhile, Kieburtz applied for work to Everett Sayler, the Company's job superintendent on the school construction job (R. 14; 106, 113, 115-116, 139-141). Sayler asked Kieburtz whether he was a member of the Union, and Kieburtz replied that he was not (R. 16; 118, 140, 149). Sayler suggested that Kieburtz leave his name at the Company's office and Kieburtz did so

⁵ The Union's business agent and secretary, Robert Buchanan, admitted that in dispatching men to jobs preference is given to the Union's members when the employment situation is not good (R. 94).

⁶ Buchanan testified that it was the Union's practice upon application of an employer to give students permits, enabling them to work during vacations; and that such an employee was required to pay a \$5 permit fee if employed on a job for more than 10 days (R. 16; 99-101, 103-105).

(R. 14, 18; 116, 117-118, 140, 142). On July 28, 1953, Kieburtz was informed by telephone that the Company had a job for him to begin the next morning (R. 14; 139, 147-148).

b. Kieburtz' employment and discharge by Company

On July 29, 1953, a Wednesday, Kieburtz reported to Sayler for work (R. 14; 119, 139, 148). Sayler assigned Kieburtz to Foreman Chester Tucker, and stated to Kieburtz, "We'll have to see how this union business works out later" (R. 14; 106, 120, 140, 148-149, 162-163). Kieburtz was put to work with another laborer, Sam Swatack, under Foreman Tucker's supervision (R. 14; 149-150).

On Friday, July 31, at about 10:30 in the morning, Kieburtz saw Elmer Wood, another of the Union's business agents, in conversation with Superintendent Sayler, and noticed one of them pointing in his direction (R. 15; 91, 155-158). Wood then spoke to Foreman Tucker, and came over to Kieburtz (R. 15; 158). Wood asked Kieburtz if he had a "card or anything" (R. 15; 158, 165-166). Kieburtz answered that he had no card but that he would like to join the Union (R. 15; 158, 166). Wood replied that Kieburtz could not become a Union member (R. 15; 158, 166). At this point, Foreman Tucker came over and stated that Kieburtz would be permitted to work out the day (R. 15; 158, 166).⁷ Continuing his conversation with Wood, Kieburtz remarked that he thought he was entitled to join the Union as long as he had a job and Wood answered that there were too many members unemployed and

⁷ Tucker testified that he heard Wood tell Kieburtz to get himself straightened out with the Union (R. 17; 184-185).

that new members would not be taken in (R. 15; 158, 166).

Kieburtz was discharged at the close of the workday. Foreman Tucker gave him two checks covering his three days of employment with the Company and said, "Sorry, but that is the way it is" (R. 15, 159-160, 163). Kieburtz then went to Superintendent Sayler who stated, "I don't know just what to tell you, kid. We have to go along with the Union on this or they could make trouble for us" (R. 15; 160). Sayler stated further that the Company had an agreement with the Union to hire through the Union's hall and that it had to go along with the Union on that (R. 15; 160). When Kieburtz protested that he thought the Taft-Hartley Act made such an arrangement unlawful, Sayler replied that the contract with the Union must be honored (R. 15; 160-161).

3. The Board's conclusions as to respondents' unfair labor practices

Upon the foregoing facts the Trial Examiner found that AGC, the Council, and the Company, by maintaining in effect a contract provision unlawfully preferring Union members for hiring and retention in employment violated Section 8 (a) (1) and (3) of the Act, and that the Union by like conduct on its part violated Section 8 (b) (1) (A) and (2) of the Act (R. 19-20). The Trial Examiner found further that the discharge of Kieburtz stemmed from the illegal contract provision requiring Union membership or approval for hire or retention of employment (R. 20-23).⁸ Accordingly, the

⁸ The Trial Examiner rejected as unsupported by the record the Company's claim that Kieburtz was discharged for poor work performance (R. 18-19; 120-126, 141, 149-160, 164-165, 180-183, 187-190).

Trial Examiner concluded that in this respect also the several respondents had violated Section 8 (a) (1) and (3) and Section 8 (b) (1) (A) and (2) of the Act respectively (R. 23).

Neither the Company nor the Union filed exceptions to the Trial Examiner's findings and recommended order. AGC and the Council, however, jointly filed exceptions defending the legality of the contract provision in issue and denying any liability on their part for the discharge of Kieburztz (R. 38-43). Following a supplemental hearing at which further commerce data was adduced (R. 45-50),⁹ AGC filed further exceptions. The Board, upon due consideration of the whole record and the exceptions filed by AGC and the Council, adopted the Trial Examiner's findings, conclusions and recommendations with certain minor additions not material here (R. 54-65).

II. The Board's Order

The Board's order (R. 58-65) directs the Company to cease and desist from conditioning hire or tenure of employment on prior clearance or approval by the Union, or any other labor organization, except as authorized by Section 8 (a) (3) of the Act; from giving effect to the illegal union-security provision of its 1950 contract with the Union or to like provisions of any later agreements; and from in any like manner violating the rights guaranteed its employees by Section 7. Cease and desist provisions to the same general effect were directed to AGC, the Council, and the Union, but ap-

⁹ The Board's order directing the holding of a supplemental hearing for the taking of additional commerce data inadvertently attributed to the Union the exceptions filed by AGC and the Council (R. 45, n. 1).

plication of the cease and desist provisions in these instances was limited to the situations where the operations of the employer involved are in or affect interstate commerce. Affirmatively, the several respondents are directed to make Kiebertz whole for earnings lost as a result of the discrimination against him and to post appropriate notices.

SUMMARY OF ARGUMENT

A. The Company and the Union, having filed no exceptions to the Trial Examiner's findings, conclusions, or recommended order, and the Board having adopted such findings, conclusions, and order, the Company and the Union are now precluded by Section 10(e) of the Act from objecting thereto before this Court.

B. The Board properly asserted jurisdiction over AGC and the Council. The AGC and the Council bargain collectively in behalf of their employer-members who are engaged in construction work directly affecting interstate commerce. Under such circumstances the Board, with court approval, has uniformly regarded such entities as employers for jurisdictional purposes. The rationale for this holding is that where employers bargain as a group with the representative of their respective employees, any labor dispute that might arise will inevitably tend to disrupt the operations of all the participating employers and thereby create a burden on the free flow of commerce. This is particularly true in the instant case where the unfair labor practices stem directly from the implementation of the contract which AGC and the Council negotiated and maintained in effect in behalf of their employer members.

C. The union-security provision of the contract here in issue and the practice thereunder transgressed the

permissible limits of union-security agreements under the Section 8(a) (3) proviso in that it granted an illegal preference to Union members in hire and tenure of employment. Enforcement of such a provision is itself a violation of Section 8(a) (1) and (3) of the Act quite apart from execution of such an agreement. A clause in the contract providing for suspension of any provision in the contract in the event that it should be "held" unlawful did not suspend the offending provision absent such a holding, and its coercive impact upon employees remained unimpaired. Nor can AGC and the Council escape liability for this unlawful union-security agreement on the ground that it merely continued an agreement in effect prior to the enactment of the Taft-Hartley Act. The exemption of Section 102 thus sought to be invoked is expressly conditioned on the non-renewal or non-extension of the agreement following the enactment of the Act and the agreement here in issue was admittedly negotiated and executed in 1950.

The claim that AGC and the Council are immune under the six-month limitation proviso of Section 10(b) of the Act because the offending provision was executed three years before the events complained of misconceives the nature of the unfair labor practice found which was, not the execution, but the continued enforcement of the illegal union security arrangement. The closely related contention that AGC and the Council are not themselves employers and cannot be held liable for the implementation of the contract by their employer members is refuted by the fact that AGC and the Council, as agents of their employer members, fall within the statutory definition of "employer" and by the further fact that on the record AGC and the Council are shown to have maintained in effect the unlawful

arrangement by which, as collective bargaining representative, they bound their employer-members. The final defense of AGC and the Council that at the time relevant here the Company was listed in their membership rolls as an individual enterprise and not as a corporation is a technical argument which fails to conceal the actual and working relationship of the Company as an employer-member of AGC and the Council and the latter's continuing representation of the Company.

D. The Board's action in reopening the proceeding for the limited purpose of adducing further commerce data it deemed necessary or appropriate for final disposition of the case conforms to accepted judicial procedure. Such procedure does not import a requirement that issues already fully litigated be subjected to relitigation merely because a different Trial Examiner sat in the reopened phase of the proceeding. Moreover, the fact that the Board subsequently had the entire record before it for the purpose of making its own determination vitiates any due process contention predicated on the fact that different Trial Examiners had earlier participated in separate phases of the case.

ARGUMENT

Statement of the Issues

Since the Company and the Union took no exception to the Trial Examiners' findings, conclusions, or recommended order, which were adopted by the Board, they are precluded by Section 10(e) of the Act from raising any objection thereto before this Court. *N.L.R.B. v. Cheney California Lumber Co.*, 327 U. S. 385, 387-389; *N.L.R.B. v. Noroian*, 193 F. 2d 172, 173 (C.A. 9); *N.L.R.B. v. Puerto Rico Steamship Ass'n*, 211 F. 2d 274, 276 (C.A. 1). And see *F.P.C. v. Colorado*

Interstate Gas Co., 348 U.S. 492. In any event, substantial evidence, summarized above, pp. 6-7, supports the Board's findings that the Company violated Section 8(a)(1) and (3) of the Act by giving effect to the illegal union-security provision in its contract with the Union and by discharging Kieburztz pursuant thereto, and that the Union violated Section 8(b)(1)(A) and (2) of the Act by giving effect to that same provision and thereby causing the Company to discharge Kieburztz in violation of Section 8(a)(3) of the Act.

There remains for consideration only the validity of the findings and order against AGC and the Council who, unlike the Company and the Union, filed exceptions before the Board.

I. The Board Properly Asserted Jurisdiction Over AGC and the Council

It is undisputed that AGC and the Council engage in collective bargaining and sign association-wide agreements with labor organizations in behalf of their employer-members. Indeed, the contract of November 3, 1950, here involved, is just such an agreement. Equally undisputed is the fact that the employer-members of AGC and the Council perform construction work outside the State of Washington in excess of \$10,000,000 a year in value, and that during 1953, the year here material, they engaged in a substantial amount of construction work directly involved in the national defense effort (*supra*, p. 3). That such a substantial flow of services across state lines and in the national defense effort affects commerce within the meaning of Sections 2(6) and (7) and 10(a) of the Act cannot be gainsaid. *I.B.E.W., Local 501 v. N.L.R.B.*, 341 U. S. 694, 699; *N.L.R.B. v. Thomas Rigging Co.*, 211 F. 2d 153, 155-156 (C.A. 9), certiorari denied, 348 U. S. 871.

AGC and the Council contend, however, that the Board improperly asserted jurisdiction over them since their own operations, apart from those of their employer-members whose operations affect interstate commerce, do not affect interstate commerce. We submit that the contention is without merit.

The Board predicated its exercise of jurisdiction here on the fact that through the medium of AGC and the Council their members participated in an association-wide bargaining group of employers whose total volume of operations substantially affects commerce. The Board's rationale for such assertion of jurisdiction was enunciated in *Carpenter and Skaer, Inc.*, 90 NLRB 417, at 419, as follows:

Consistent with our well established policy in representation cases we find that in passing upon the jurisdictional issue herein, the Association and its members must be regarded as a single enterprise. That the totality of the operations, in volume and character, of all members of the Association has a substantial effect on interstate commerce is apparent. The fact that we might not assert jurisdiction as to each member of [sic] before the Board individually or that this proceeding does not directly involve all its members is not here material, because the alleged unfair labor practices are attributed to the Association itself and are the result of the application of a common labor policy by the Association on behalf of its members including those involved herein.¹⁰

¹⁰ See also *Vaughn Bowen*, 93 NLRB 1147, 1149-1150, cited with approval in *N.L.R.B. v. Gottfried Baking Co., Inc.*, 210 F. 2d 772, 778 (C.A. 2); *South Texas Chapter, Associated General Contractors of America, Inc.*, 110 NLRB 638, 639.

Where, as here, employers bargain as a group with the representative of their respective employees, any labor dispute that might arise would have the inevitable tendency to disrupt the operations of all the participating employers and bring about a serious interruption to the free flow of interstate commerce. Accordingly, the Board's exercise of jurisdiction over individual employers who are members of an association which bargains for a common labor contract has been sustained on the basis of the totality of operations of all the employer-members of such an association. *Leonard v. N.L.R.B.*, 197 F. 2d 435, 436 n. 1 (C.A. 9); *N.L.R.B. v. Gottfried Baking Co., Inc.*, 210 F. 2d 772, 778 (C.A. 2); cf. *Katz v. N.L.R.B.*, 196 F. 2d 411, 413 (C.A. 9). Identical considerations support the Board's jurisdiction over the association itself, particularly where, as here, the implementation of the contract negotiated by the association in behalf of its members forms the basis of the unfair labor practices. See *N.L.R.B. v. Waterfront Employers of Washington*, 211 F. 2d 946 (C.A. 9); *N.L.R.B. v. Sun Tent-Luebbert Co.*, 151 F. 2d 483, 485-486 (C.A. 9), certiorari denied, 329 U. S. 714; *Red Star Express Lines v. N.L.R.B.*, 196 F. 2d 78, 80 (C.A. 2); *N.L.R.B. v. George D. Auchter Co.*, 209 F. 2d 273 (C.A. 5). Cf. *N.L.R.B. v. ILWU, Local 10*, 214 F. 2d 778 (C.A. 9); *Joliet Contractors Ass'n. v. N.L.R.B.*, 193 F. 2d 833 (C.A. 7).¹¹

¹¹ Because of the absence of any exceptions by the Company, it is superfluous to emphasize that the evidence summarized above, pp. 3-4, as to the operations of the Company itself affords ample basis for the Board's assertion of jurisdiction over that enterprise.

II. The Board Properly Concluded that AGC and the Council Violated Section 8 (a) (1) and (3) of the Act

As shown above, p. 4, the contract of November 3, 1950, in effect in 1953, the time material here, required all employer-members of AGC and the Council to employ members of the Union only.¹² The practice under this agreement was for the Company to advise the Union of its need for employees, and such men would then be dispatched from the Union hall to the construction site, Union members invariably being dispatched before others (*supra*, pp. 4-5). It is settled law that union security agreements or arrangements granting preference in employment to union members beyond the limited conditions permitted by Section 8 (a) (3) of the Act are illegal. *N.L.R.B. v. Daboll*, 216 F. 2d 143, 145 (C.A. 9), certiorari denied, 348 U. S. 917; *N.L.R.B. v. Swinerton*, 202 F. 2d 511, 514-516 (C.A. 9), certiorari denied, 346 U. S. 814. Equally well settled is the principle that the enforcement of such an agreement quite apart from its execution constitutes a violation of the Act. *N.L.R.B. v. Daboll*, *supra*; *Katz v. N.L.R.B.*, 196 F. 2d 411, 415 (C.A. 9). Applying these settled principles to the instant case it follows, we submit, that AGC and the Council, by maintaining in effect the illegal union-security arrangement with the Union which they had negotiated in behalf of their employer-members and out of which, *inter alia*, the discharge of Kiebertz stemmed, violated Section 8 (a) (1) and (3) of the Act.

¹² No provision was made for a 30-day grace period for employees to acquire union membership, a minimal requirement for a valid union-security agreement under the proviso to Section 8 (a) (3) of the Act.

AGC and the Council do not challenge the controlling principles here applied. They do, however, seek to absolve themselves of liability on several grounds: (1) that the union-security provision of the 1950 contract, in effect here, was not illegal inasmuch as that contract contained a savings provision making it inapplicable to employers engaged in operations affecting interstate commerce; (2) that the union-security provision of the 1950 contract was merely a continuation of a similar provision in effect prior to the enactment of the Taft-Hartley Act, and hence was immunized by Section 102 of the Act; (3) that, in any event, their sole offense was the negotiation and execution of the offending provision, liability for which was barred by the six-month limitations provision of Section 10 (b); (4) that inasmuch as they played no direct role in the administration or effectuation of the offending provision, neither the discharge of Kieburts nor any other unfair labor practice arising from the operation of that provision by the employer-members could be attributed to them; and (5) that they could not be held liable for the conduct of the Company because the Company was never a member of AGC or Council at any time here relevant in its corporate capacity. We submit that none of these defenses has merit.

The savings provision.—Section 11 of the contract here in issue provides that (R. 208-209):

If any section, subsection, clause, sentence or phrase of this agreement is, for any reason, held to be repugnant to, or in conflict with or in violation of the Labor Management Relations Act of 1947 . . . such repugnancy, conflict or violation shall not affect the validity of the remaining portions of this agreement . . .

AGC and the Council argue that the effect of this language is to limit the union-security provision only to those of its members engaged in intrastate commerce and to preclude its application to operations like those of the Company affecting interstate commerce. But, as the Board found (R. 19-20), the plain language of Section 11 affords no such distinction. It provides merely that if the union-security provision or any other provision of the contract should be "held" illegal, the remaining portions of the contract shall remain in effect. It does not, absent such a holding, suspend or defer the operation of the offending provision. The gravamen of the offense here is that "the existence of such an agreement without more tends to encourage membership in a labor organization." *Red Star Express Lines v. N.L.R.B.*, 196 F. 2d 78, 81 (C.A. 2). As stated in *N.L.R.B. v. Gaynor News Co., Inc.*, 197 F. 2d 719, 723-724 (C.A. 2), affirmed, 347 U. S. 17,

. . . an employee cannot be expected to predict the validity or invalidity of particular clauses in the contract and will feel compelled to join the union where a union-security clause of questionable validity exists, if only as a hedging device against a possible future holding of the clause. Only a specific provision deferring application of the union-security clause will immunize the contract against this illegality.

Accord: *N.L.R.B. v. Knickerbocker Plastic Co., Inc.*, 218 F. 2d 917, 923-924 (C.A. 9). No such specific provision is present here.¹³

¹³ As already noted, pp. 8-9, the Board's order against AGC and the Council, like its order against the Union, enjoining unlawful union-security arrangements is carefully framed to apply only to employers whose operations affect interstate commerce. Compare *N.L.R.B. v. Sterling Furniture Co.*, 202 F. 2d 41 (C.A. 9).

The Section 102 argument.—Section 102 of the Act, so far as relevant here, precludes application of Section 8 (a) (3) and 8 (b) (2) sanctions for the performance of any obligation under a collective bargaining agreement entered into prior to the enactment of the Taft-Hartley Act where such performance would not have constituted an unfair labor practice theretofore, “unless such agreement was renewed or extended subsequent thereto.” In view of the undisputed fact that the current contract here in issue was executed as an independent agreement on November 3, 1950, three years after the enactment of the Taft-Hartley Act, the claim of AGC and the Council to immunity under Section 102 because of the existence of similar union-security provisions in agreements prior to 1947 requires no further refutation. See *N.L.R.B. v. Daboll*, 216 F. 2d 143, 145 (C.A. 9), certiorari denied, 348 U. S. 917.

The Section 10 (b) argument.—Under the terms of Section 10 (b) of the Act no complaint can issue upon an unfair labor practice occurring more than six months before the filing and service of a charge. AGC and the Council urge that since their only action consisted of the negotiation and signing of the contract containing the offending provision and since that action occurred nearly three years prior to the filing of the charges herein, Section 10 (b) precluded the Board from proceeding against them. In making this defense, however, AGC and the Council misconstrue the nature of the violation found and their responsibility therefor. As already shown (p. 4, n. 4), and as demonstrated more fully later, AGC and the Council continued to give effect to the contract in 1953 and their employer-members necessarily did likewise. This continued enforcement of the contract within the limitations period

formed the basis for the Board's finding here. See *Katz v. N.L.R.B.*, *supra*, 211 F. 2d, at 415.

The non-participation argument.—Closely related to the foregoing contention is the claim of AGC and the Council that they merely negotiated the contract here in issue as agent for their employer-members, that they were not themselves employers, and that they participated in no way and could not be held responsible for the application of the contract provisions, a function which devolved exclusively upon the several employer-members. But AGC and the Council overlook the fact that in acting as agent for their employer-members in collective bargaining and in fixing terms and conditions of employment for the employees of its members they are themselves employers within the literal language of Section 2 (2) of the Act and responsible for the foreseeable consequences of the conditions they created. *Radio Officers v. N.L.R.B.*, 347 U. S. 17, 45.

Moreover, the crux of the matter is that AGC and the Council on behalf of their employer-members entered into a contract containing an illegal union-security arrangement, and that they made no attempt to remedy that situation but on the contrary continued it in effect. Under the contract, the initiative in cancelling or amending the agreement falls upon AGC and the Council, not upon the employer-members (R. 206-207). Indeed, Colton D. Harper, Assistant Manager of AGC, testified that AGC and the Council continued to give effect to the contract in 1953 (R. 82-84), and Eugene F. Shuck, Jr., vice-president and secretary of the Company, testified that the AGC contract controlled its relations with the Union and was in effect in 1953 (R. 105, 108-109). Under these circumstances AGC and

the Council may not evade continuing responsibility for the situation they created and maintained in effect. This Court in *Waterfront Employers of Washington v. N.L.R.B.*, 211 F. 2d 946, 951, 953-954, rejected a contention virtually on all fours with the instant claim.

By the same token, AGC and the Council may not evade liability for the discharge of Kieburtz on the ground that they did not participate directly in the mechanics of that discharge. The Board adopted the Trial Examiner's finding, not excepted to by either the Company or the Union, the parties directly involved, that the discharge stemmed from the illegal union-security provision (*supra*, p. 7). Everett Sayler, job superintendent of the Company, explained to Kieburtz in discussing his discharge that the contract with the Union had to be honored (*supra*, p. 7). In this frame of reference, as the Board found (R. 58), AGC and the Council "discriminated in regard to the hire and tenure of employment of Kieburtz to the same extent as Shuck" and are correspondingly liable. See *Waterfront Employers of Washington, supra*.

The nonmembership of the Company.—The final defense of AGC and the Council on this phase of the case is that E. F. Shuck Construction Co., Inc., the Company found to have engaged in unfair labor practices, was a corporation and that no such corporation was listed in the AGC roster of members until after the events complained of. The contention is hypertechnical. The record establishes (see p. 4, n. 3, *supra*) that Shuck, Sr., conducted a construction business in his own name prior to 1949 and was a member of AGC, that the incorporation of the Company in 1949 made no difference in the business entity so far

as relevant here, and that the continued listing, membership, and representation of the Company in AGC as an individual enterprise rather than in its corporate name was due merely to the fortuitous circumstance that a request in writing for such a change of listing was not made until after the events here complained of. The technical niceties of corporate relationships, however valid for other purposes, may not be used to defeat the purposes of the Act. See *N.L.R.B. v. Stowe Spinning Company*, 336 U.S. 226; *N.L.R.B. v. Condenser Corp.*, 128 F. 2d 67, 71 (C.A. 3).

III. The Board's Action in Reopening the Proceeding for the Limited Purpose of Adducing Further Commerce Data Was Valid and Proper

As already noted, p. 8, the Board on February 9, 1955, following the issuance of the Trial Examiner's Intermediate Report, directed that the record be reopened for the limited purpose of adducing further commerce data (R. 43-45). For reasons not appearing, a different Trial Examiner sat on this phase of the case (R. 46). AGC and the Council contend that the Board violated procedural due process by limiting the reopened proceeding and by denying respondents an opportunity to relitigate all the issues.

The short of the matter is that the parties had full opportunity to litigate all the issues at the initial hearing. The second hearing was directed merely because, following the issuance of the original Intermediate Report, the Board had revised the standards governing its assertion of jurisdiction and accordingly deemed it appropriate to supplement the commerce data in the record to determine whether jurisdiction should be asserted under the revised standards (R. 44). See

Jacobsen v. N.L.R.B., 120 F. 2d 96, 98-101 (C.A. 3). In so doing, the Board was not required to permit respondents to relitigate all the issues.

It is accepted judicial practice to confine a remand to the specific purpose for which it is deemed necessary. See, e.g., *N.L.R.B. v. Retail Clerks Union Local 648*, 186 F. 2d 371, 372 (C.A. 9); *N.L.R.B. v. Cambria Clay Products Co.*, 215 F. 2d 48, 56 (C.A. 6); *N.L.R.B. v. Dallas City Packing Co.*, 230 F. 2d 708 (C.A. 5). Moreover, while the function of the new Trial Examiner was limited to the purpose of the remand, the Board itself had the entire record before it for its consideration. See *Willapoint Oysters, Inc. v. Ewing*, 174 F. 2d 676, 696 (C.A. 9), certiorari denied, 338 U. S. 860; *N.L.R.B. v. Stocker Mfg. Co.*, 185 F. 2d 451, 452-454 (C.A. 3), and cases cited therein. Thus, respondents were in no way prejudiced by the narrow scope of the remand. “[D]ue process deals with substance, not with form.” *N.L.R.B. v. Townsend*, 185 F. 2d 378, 382 (C.A. 9), certiorari denied, 340 U. S. 811; *Fay v. Douds*, 172 F. 2d 720, 725 (C.A. 2).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.¹⁴

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JULY, 1956.

¹⁴ The objection of AGC and the Council to the requirement of the order that they post notices at the Company's job sites on the ground that they have no authority to go on those job sites seems neither valid nor realistic in view of the relationship between AGC, the Council, and their members, and in view of the fact that the Company is likewise subject to the Board order. Moreover, the order here, not unlike that enforced by this Court in *N.L.R.B. v. Waterfront Employers of Washington*, 211 F. 2d 946, 952 (C.A. 9), is precisely "adapted to the situation which calls for redress" (*N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348. In *N.L.R.B. v. Gluek Brewing Co.*, 144 F. 2d 847, 857, the Eighth Circuit rejected an analogous contention and suggested that the parties there involved could "work out the intent of the order." In any event, the question of the feasibility of compliance can be determined later after AGC and the Council have made a sincere effort to comply. See *N.L.R.B. v. Caroline Mills, Inc.*, 167 F. 2d 212, 214 (C.A. 5).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Sec. 151, *et seq.*), are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

(1) The term “person” includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term “employer” includes any person acting as an agent of an employer, directly or indirectly,

* * * *

(6) The term “commerce” means, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term “affecting commerce” means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day

following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; . . .

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . .

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, . . .

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: . . .

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(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact

if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

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Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

No. 15084

IN THE
UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

E. F. SHUCK CONSTRUCTION COMPANY, INC.;
THE ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, SEATTLE CHAPTER, INC.;
THE SEATTLE CONSTRUCTION COUNCIL;
and HOD CARRIERS' BUILDING AND COM-
MON LABORERS' UNION, LOCAL No. 242,
AFL,

Respondents.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD AND CROSS-
PETITION FOR REVIEW OF SAID ORDER

**BRIEF OF RESPONDENT, ASSOCIATED
GENERAL CONTRACTORS OF AMERICA,
SEATTLE CHAPTER, INC.**

LYCETTE, DIAMOND & SYLVESTER
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**BRIEF OF RESPONDENT, ASSOCIATED
GENERAL CONTRACTORS OF AMERICA,
SEATTLE CHAPTER, INC.**

I. JURISDICTION

This matter is before the Court both upon the Board's Petition for Enforcement and the Petition of Associated General Contractors, Seattle Chapter, Inc., for Review of the Board's Order.

The jurisdiction of this Court to review the order

of the National Labor Relations Board is founded upon Paragraph f of Section 160, Title 29, United States Code.

II. ADDITIONAL STATEMENT OF THE CASE

The Associated General Contractors, Seattle Chapter, Inc., and the Seattle Construction Council are one and the same (A. 47), the Seattle Construction Council being merely a name by which a portion of the activities of Seattle Chapter, Inc., are carried on. Hence, hereafter in this brief, we shall refer to Associated General Contractors, Seattle Chapter, Inc., as AGC and shall not make separate reference to Seattle Construction Council, but it may be understood that our use of the term AGC will include both Seattle Chapter, Inc., and its activity, Seattle Construction Council.

The corporate defendant, E. F. Shuck Construction Co., Inc., was not at any time material to this case, a member of AGC (R241, 242). Mr. E. F. Shuck, personally, who was an officer of E. F. Shuck Construction Co., Inc., was a member of AGC, but the corporation had never been admitted to membership (R230). In order to become a member, board action by the AGC was necessary and such action had never occurred with respect to E. F. Shuck Construction Co., Inc. (R241).

The Labor Agreement under consideration, was

entered into November 3, 1950 (R205) and was signed on behalf of AGC by a committee of its members, namely Cliff Mortensen, George E. Teufel, R. B. Lane, Oscar Sundberg, and E. B. Hickok (R209). There is no showing that AGC had any further connection with the carrying out of the agreement or operations under the agreement subsequent to its being entered into. The AGC did not act as a hiring agent for any persons who worked on the job in question, nor did it have any contractual relations with any persons who worked on the job (R231). Neither did it have any contractual relationship with E. F. Shuck Construction Co., Inc. (R232). The AGC is a service organization for its members (R229). There is no showing or finding that it assumed any liability for the wages of employees of its members or participates in any way in hiring, paying, discharging or directing its members' employees.

The job in question was a local one for a school district of the State of Washington (R240), and there is no showing or finding that it affected commerce in any way. There is nothing in the record to show what, if any, proportion of the materials used on the job involved in this proceeding came across the state lines, and there is nothing in the record to indicate that the individual complainant, Richard B. Kieburtz, was or might have been employed in

connection with any work done or to be done by E. F. Shuck Construction Co., Inc., in connection with commerce, or in any manner other than on the local school job. There is no showing or finding that there was any continuity of personnel in employment between the local school job and any jobs affecting commerce which E. F. Shuck Construction Co., Inc., did nor is there any showing or finding that there was any such connection that conditions on the local job in any manner affected any of the jobs relating to commerce.

The AGC itself is a corporate entity separate from its members (R229). There is no evidence that the AGC itself employs any persons in commerce or carries on construction or selling work affecting commerce or buys materials crossing state lines in any quantities whatsoever.

(a) The questions involved in this case are as follows:

(1) Does one who acts as agent for an employer in collective bargaining thereby assume personal liability for back pay to employees held to be discriminated against by the manner in which the employer applies the contract?

This question is raised in this case by the assessment against AGC of reparations to complainant, Kieburtz, by Section 2 of the order of the National Labor Relations Board, particularly Subsection (b) (1) thereof (R62).

(2) May a charge be filed against an agent who negotiated a contract, based upon an alleged discrimination which occurs at any time in the future so long as the contract remains in effect?

This question arises by reason of the fact that the order of the National Labor Relations Board assessing reparations against AGC (R61) is based upon an alleged discrimination against employee, Kieburtz, occurring more than six months after the contract was negotiated, as shown in Paragraphs IX, X and XII of the complaint (R4 and 5), with no more participation shown on the part of AGC than that the contract was still in effect (R82-84).

(3) Does an incorporated association become an "employer," as that term is defined in the National Labor Relations Act, solely by reason of the fact that some of its members are "employers" engaged in commerce?

This question arises because the findings of the National Labor Relations Board hold that AGC falls within the Board's jurisdiction (R56 and 57), and is subject to the liabilities for an "employer," but the Board's jurisdiction to assess reparations for unfair labor practices extends only to "employers" as defined in the act, and the authority of the Board extends only to matters affecting commerce.

III. SPECIFICATION OF ERRORS

The National Labor Relations Board erred in the following respects:

(1) In holding that AGC is subject to the jurisdiction of the National Labor Relations Board and was an "employer engaged in interstate commerce" within the meaning of the National Labor Relations Act.

(2) In not dismissing the action as to AGC because of its not being commenced within the time limited by law, particularly Section 10 (b) of the National Labor Relations Act (29 U. S. C. 160), which provides, among other things, as follows:

"Provided that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the Armed Forces, in which event, a six-months' period shall be computed from the date of his discharge. * * *"

(3) In finding that the alleged unfair labor practice affected commerce.

(4) In finding that this respondent engaged in any unfair labor practice.

(5) In assessing reparations against this respondent.

(6) In requiring this respondent to post certain notices on premises to which it has no access.

(7) In not dismissing the action as to AGC.

IV. ARGUMENT

In this case, the court has before it a petition for enforcement filed by the National Labor Relations Board, and also a Petition for Review filed on behalf of AGC. The issues raised by the two petitions are identical, consequently we shall discuss these issues together.

(a) AGC Is Not Liable for Reparations

The crucial issue in this case is the status of one who participates as an agent in collective bargaining. The complaint against the AGC in this case is based solely upon the fact that it acted as the agent for a group of employers in negotiating the contract under which the alleged discrimination was held to have taken place.

The implications of attempting to hold the negotiator of a contract liable for all the acts of those parties for whose benefit it was negotiated are so dangerous that if established, it would make industry-wide bargaining too perilous for anyone to undertake. The National Labor Relations Board in this case has undertaken to assess against AGC reparations for back wages due employee, Kieburtz (R62). There was no express finding that the AGC is an "employer" within the meaning of the act, but such a finding is implied in the order, since the only right of the Board with respect to such assessment

of reparations, is derived from Section 10 (c) of the National Labor Relations Act (U. S. C. A. Title 29, Section 160) in the following language:

“If upon preponderance of the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person, an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay as shall effectuate the policies of this sub-chapter; provided that where an order directs reinstatement of an employee, back pay may be required *of the employer or labor organization*, as the case may be, responsible for the discrimination suffered by him * * *” (Emphasis supplied)

It will be noted that under the act only an “employer” or a labor organization may be held for the *back pay* of one discriminated against. The act does not justify assessing the liabilities of an employer against an agent such as the AGC in this case.

It is apparently the contention of the Government that any agent of an employer becomes itself an employer for all purposes and subject to all of the obligations of an employer. The Government derives this contention from the definition contained in Section 2 (2) of the National Labor Relations Act, Title 29 U. S. C. Section 152, which reads as follows:

“The term ‘employer’ *includes* any person acting as an agent of an employer, directly or

indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.” (Emphasis supplied)

A careful examination of this provision of the act will demonstrate that it does not have the effect that counsel for the Government contend. The definition of employer does not undertake to change that word from its ordinary meaning. In other words, the term employer is not given a special definition, but is only held to *include* an agent. Since the meaning of the term employer is not varied by the definition, it takes its ordinary meaning. *U. S. v. Cooper Corp.*, 312 U. S. 600, 85 L. Ed. 1071; *Deputy v. Dupont*, 308 U. S. 488, 84 L. Ed. 416. To be an employer, one must employ persons. Funk & Wagnall’s New Standard Dictionary defines Employer as: “One who employs; one who uses or engages the services of other persons for pay.” AGC does not come within this definition.

The effect of the statement in the statute that the term “employer” shall include an agent is to make an employer liable for the acts of the agent. That is

the only effect of that section of the statute. The act was never intended to cast the liability of employers *in toto* upon their mere agents.

If the Government's contention is correct and if every agent of the employer which participated in any way directly or indirectly in the making of the contract is an employer, we have no stopping place as to the extent of the liability. Thus, in this case, if the Government is correct, not only is the AGC an employer liable for the back pay, but we presume that it would be within the province of the National Labor Relations Board to hold also that the individual members of the committee, namely, Cliff Mortensen, George T. Teufel, R. B. Lane, Oscar Sundberg and E. B. Hickok, who signed the labor contract (R209), could be, each individually, employers and liable for the full amount of the reparations. Likewise, if the Government is correct, the attorney who drafted the agreement and the stenographer who typed it and the messenger boy who delivered it, are each agents of the employers, and are liable for the reparations. Carried to its logical conclusion, the contention reduces itself to an absurdity. If every agent of the employers participating directly or indirectly in the negotiation of this contract, is an employer and liable for the back pay, then those actually named as respondents would be entitled to contribution from all other agents of the

the result of negotiation of the contract and the joint and several liability should be distributed more employer who contributed directly or indirectly to broadly. The mere statement of this proposition, carries with it its own refutation. We submit that the liabilities of an employer are cast only upon those who employ persons, although the term is broad enough to make the employer liable for conditions brought about by acts of his agents and agents may be restrained from doing on behalf of an employer acts constituting or contributing to an unfair labor practice.

The language of Section 2 (2) of the National Labor Relations Act in defining the word employer, does not either literally or by intent confer pecuniary liability for an employers' acts upon all of the agents who participate in them. The Supreme Court of the United States in the case of *Packard Motor Car Company v. National Labor Relations Board*, 330 U. S. 485, 91 L. Ed. 1040, stated that the purpose of this definition is merely to apply the rule of *respondeat superior* in cases under the National Labor Relations Act. It is implicit in Section 2 of the National Labor Relations Act that the intent is to make the principal liable for the acts of an agent, thus subsection (13) of Section 2 (29 in U. S. C. 152) reads:

“In determining whether any person is acting as an agent of another person so as to make

such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified, shall not be controlling.”

The language of the Supreme Court of the United States in *Packard Motor Car Company v. National Labor Relations Board*, 330 U. S. 485, 91 L. Ed. 1040, found on Page 485 of the official reports and Page 1049 Law Edition in explaining the purpose of the definition of employer found in Section 2 (2) is as follows:

“The purpose of Section 2 (2) seems obviously to render employers responsible in labor practices for acts of persons performed in their interests. It is an adaptation of the ancient maxim of the common law, *respondeat superior*, by which a principal is made liable for the tortious acts of his agent and the master for the wrongful acts of his servants. Even without special statutory provisions the rule would apply to many relations. But Congress was creating a new class of wrongful acts to be known as unfair labor practices, and it could not be certain that the courts would apply the tort rule of *respondeat superior* to those derelictions. Even if it did, the problem of proof as applied to this kind of wrongs might easily be complicated by questions as to the actor’s scope of authority and of variance between his apparent and his real authority. Hence, it was provided that in administering this act the employer for its purposes should be not merely the individual or corporation which was the employing entity, but also others whether employee or not, who are ‘acting in the interest of an employer’.”

In the case from which we have just quoted, the Supreme Court held that foremen who came tech-

nically within the description of agents of the employer, were not thereby rendered "employers" to the point that they could not form a union. The Supreme Court thereby recognized the principle that the words of inclusion contained in Section 2 (2) of the National Labor Relations Act do not confer all of the attributes of an employer for all purposes upon an agent, but only have the effect of making the principal liable for the acts of the agents.

In the present case, there is no evidence that the AGC hired, fired, supervised, employed, paid or became liable for the payment of any persons employed pursuant to the contract. AGC was not an employer in the ordinary, dictionary sense of that term. It assumed no contractual relation to pay wages to Kieburtz or to anyone else employed under the contract, nor did it do the hiring or the firing or stand in the position of the one to whom workers looked for payment or direction (R231). In other words, in the ordinary sense, AGC was not an employer. Under Section 10 (a) of the National Labor Relations Act (29 U. S. C. Section 160) the National Labor Relations Board is empowered to prevent any "person" from engaging in any unfair labor practice affecting commerce. We would not contend that the AGC under proper facts might not be enjoined from continuing to engage in an unfair labor practice, but this is a far different thing from say-

ing that it, as an agent, has the obligations of an employer to make payments of back pay to one who is wrongfully discharged. AGC is subject to such jurisdiction as the Board has over "persons," but not the obligations which the law places upon "employers," although its act can result in liability upon the part of an employer by reason of its agency.

The only really important issue in this case is that of financial liability upon the part of those acting as agents for employers for collective bargaining purposes, since the case has now become moot as to everything else. The contract which was deemed to be in violation of the National Labor Relations Act, expired December 31, 1953 (R84). The particular job in question was completed long ago and the employment of complainant Kieburts would have ended in any event in October of 1953 (R25). The only thing that is not moot is the matter of back pay. It is important that the status of negotiators on behalf of employers be cleared up. We submit that the AGC in this case is not liable for the back pay. Neither it nor the individual members of the committee under any of the rules of agency are liable for pay or back pay to this individual.

This case is to be distinguished from the decision of this court in the case of *National Labor Relations Board v. Waterfront Employers' Association*, 211 F. (2d) 946, since in that case, the Waterfront Em-

employers' Association was actually the paymaster for the employers and actually stood in the relation of employer to the employees. This is not the case here where the sole connection of the AGC was in negotiating the original contract.

The AGC is not an employer since it does not employ any of the people affected by the contract and has no contractual relations with them and cannot be charged with the financial obligations to them of their employers. The National Labor Relations Board was in error in holding the AGC liable for the back pay awarded Kieburtz.

(b) The Procedure Was Not Commenced Within the Time Limited by Law.

The National Labor Relations Board has undertaken to hold AGC liable for an unfair labor practice upon the basis of a contract which they negotiated in November of 1950 (R205 to 209). There was no showing made by the Government that the Associated General Contractors had done anything in connection with that contract subsequent to the time of its negotiation. AGC merely acted as the convenient representative of its employer members to negotiate and sign an industry-wide agreement (R205, Page 1, Ex. 2). It does not employ any persons pursuant to the contract (R231), nor does it discharge any persons, and under the contract, it did not be-

come responsible for payment of any wages to the employees.

Section 10 (b) of the National Labor Relations Act (29 U. S. C. 160) provides in part:

“Provided that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom the charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the Armed Forces, in which event, the six months’ period shall be computed from the day of his discharge.”

If the Associated General Contractors performed any act which violated the National Labor Relations Act, it could have only done so in the negotiation of the contract. That negotiation was concluded nearly three years prior to the filing of the charge (R205) in this case and is, therefore, barred by the section of the statute just quoted. In order to impose liability under the National Labor Relations Act, as in any other case, the facts constituting the violation must be proved. No proof has been adduced by the Government in this case to indicate that the AGC did anything whatsoever within the six months’ period prior to the filing of the charge. The findings of the Board stated (R58) :

“We further find, as did the trial examiner in the original proceeding, that as the discrimination found herein stemmed from a contractual relationship between Shuck and the Union and because the contract was the product of

negotiations between the Associated General Contractors and the Seattle Construction Council on the one hand, and the Union on the other, that the Associated General Contractors and the Seattle Construction Council discriminated in regard to hire and tenure of "employment of Kieburtz to the same extent as Shuck, thus encouraging membership in the Union, and thereby violating Section 8 (a) (3) of the Act."

There is no finding, and there was *no evidence* to support any contention that the AGC *did anything* subsequent to the time that the contract was negotiated with respect to carrying it out, enforcing it or keeping it in effect, although the examiner in his third conclusion of law (R26) stated:

"By enforcing the unlawful provisions of the November 1950 contract, thus causing a discrimination in regard to the hire and tenure of employment of Richard B. Kieburtz, respondent Shuck, respondent General Contractors, and respondent Construction Council have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act."

There was absolutely *no evidence* to support the conclusion that the AGC did anything to enforce the contract. The Government offered no proof that any enforcement by the AGC had occurred, and consequently no evidence was offered to rebut any such claim. Had such contention been advanced at the hearing, the AGC could have shown that their members had been repeatedly advised by them that the Union Security Clause of the contract should

not be applied in cases where there was any likelihood that commerce was affected.

It was not incumbent upon AGC to negative contentions not advanced, and consequently evidence of their actual conduct with respect to the contract is not in the record. However, neither is there any evidence in the record to support any contention that within the six months prior to the filing of the charge, AGC enforced the provision, carried it out, or retained it in effect in any case where commerce was involved. In this respect, this case differs from the case of *NLRB v. Water Front Employers' Association*, 211 F. (2d) 946, in which it was admitted that the association had participated in the enforcement of the agreement. The mere fact of the negotiation of a contract does not per se establish that the agent carrying on the negotiations thereafter enforced it or carried it out. There is no evidence in this case that the AGC had any knowledge whatsoever of the application of the Union Security Clause in any case involving commerce or particularly in the case of Kieburts, or that it did anything within the six months' period upon which any action against it might be predicated.

Since any act performed by AGC which might have constituted an unfair labor practice occurred more than six months prior to the filing of the charge, the complaint should have been dismissed

pursuant to the terms of Section 10 (b) of the National Labor Relations Act.

(c) There Is No Evidence That Commerce Was Affected

In order for the National Labor Relations Board to have jurisdiction, there must be an unfair labor practice affecting commerce. This is the requirement of Section 10 (a) of the Act. (U. S. C. Title 29, Section 160). The opening sentence of that section reads:

“The Board is empowered as hereinafter provided to prevent any person from engaging in any unfair labor practice (listed in Section 8) *affecting commerce*. * * *” (Emphasis supplied)

There was no evidence to sustain any finding that commerce was involved. Neither was there any finding that AGC was so associated with commerce that its every act affects commerce. *No member of the AGC is involved in this proceeding.* The respondent named in the complaint, E. F. Shuck Construction Co., Inc., was not a member of AGC (R230, 231 and 241). E. F. Shuck, as an individual, was a member of AGC, but he was only an officer in the corporation (R245). There is no complaint in this case against E. F. Shuck as an individual. The AGC had no contractual relationship as to membership with the employer on the job in question (R231). Notwithstanding the easy disposition of this point by the Board in simply saying that the failure to

change the name from that of Mr. Shuck as an individual to that of E. F. Shuck Construction Co., Inc., was a minor disparity (R49), nevertheless the evidence was uncontradicted that a change in membership from that of an individual to a corporation required action of the Board of AGC and such action had not occurred (R241). The mere fact that the corporation paid the dues of Mr. E. F. Shuck in the AGC did not make the corporation a member any more than does the fact that an employer might pay the dues of an employee in the Chamber of Commerce, make the employer, as distinguished from the employee, a member of the Chamber of Commerce. There is no evidence upon which any claim can be made that AGC is bound by the actions of nonmembers who may elect to act under contracts which it has negotiated. It is probably true that most contractors in the Seattle area do conform to contracts negotiated for the industry, but this is only a matter of their convenience in getting along with the labor organizations. The difference between E. F. Shuck, Sr., as an individual, and E. F. Shuck Construction Co., Inc., a corporation, is much more than a difference in name. These are actually separate entities. This is not a matter merely of the manner in which a name is listed on a roster. It is not merely a matter of changing a name, but a matter of changing the actual member from Mr. Shuck

to the corporation, which was separate and distinct from the man.

Since there is no contractual relationship between AGC and the corporation, E. F. Shuck Construction Co., Inc., AGC cannot be held liable for the manner in which the corporation applied the contract which had been negotiated. Neither can it be said that AGC was applying or enforcing the contract on this job, nor can the job upon which Kieburtz was employed be held to affect commerce by reason of any connection of Shuck with commerce through association with the AGC.

The job involved in the discharge of Kieburtz was completely a local operation, namely the building of a schoolhouse (R240). No evidence was brought out to indicate that there was any integration of the jobs of Shuck Construction Co., Inc., to make those other jobs related, in any manner, to the school job, so that construction on the school job affected commerce. We submit that a corporation, like any individual, may be associated with commerce at one time and not associated with it at another. To illustrate, we seriously doubt that the court would hold that a housemaid, hired to perform domestic service in the home of a man who worked in commerce, would be considered within the terms of the National Labor Relations Act. In other words, for commerce to be affected, there must be such a re-

lation that the employment in question would have some effect on commerce. If such is the case in the present instance, there was no showing of that kind in the evidence. The evidence indicated that Kieburtz was employed for the sole purpose of doing extra work on the local school job. The evidence does not indicate that the job upon which he was employed was an instrumentality or channel of interstate or foreign commerce, neither was it a part of a utility or transit system. No evidence was introduced to show that this job which was separately bid, operated as an integral part of any interstate or foreign operation of Shuck Construction Co., Inc. The evidence does not indicate even that the same employees who were concerned with this job, were also concerned with any job affecting commerce, or that there was any other connection. There was no evidence that the enterprise employing Kieburtz produced goods for shipment outside of the state, or that it furnished services to an operation over which the Board exercised jurisdiction. The school which was under construction is in no way concerned with commerce and is a prime example of a local operation. There was no evidence that national defense was affected nor was there any evidence that any substantial amount of the material used in the construction job in question passed in interstate or foreign commerce. All the usual tests to determine

whether commerce was affected, may be applied and no proof will be found to establish that the requisite condition exists. The evidence will show that Shuck Construction Co., Inc., was engaged in a separate and distinct operation, in no way concerned with its other jobs, and the job itself was entirely a local intrastate activity.

With respect to AGC, the proof merely showed that some of its members are engaged in interstate and foreign commerce but there was no showing that AGC itself was so engaged or that the engagement of its members in interstate or foreign commerce in any manner, affected the school job of E. F. Shuck Construction Co., Inc. The position of AGC was simply that of a negotiator for its members. It should be borne in mind that it has members which do not engage in commerce, as well as members which do. The AGC is a separate corporate entity (R229). It is, therefore, not identical with its members. It had as much right to act as negotiator on behalf of those who do not engage in commerce as for those who are so engaged, and we submit that it was perfectly in order for the AGC to negotiate a contract which would be appropriate to either class of members. That is exactly what was done in this case. The express recognition of the fact that the National Labor Relations Act would apply to some sections of the contract, and under some cir-

cumstances, would make portions of it inapplicable, is shown by the inclusion of Section 11 of the contract, which provided (R208) :

“If any section, subsection, clause, sentence or phrase of this agreement is, for any reason, held to be repugnant to or in conflict with or in violation of the Labor-Management Relations Act of 1947, otherwise known as the Taft-Hartley Labor Act, being 29 U. S. C., 141 *et seq.*, such repugnancy, conflict or violation shall not affect the validity of the remaining portions of this agreement, and all portions thereof not repugnant to or in conflict with or in violation of said Labor-Management Relations Act of 1947 shall be enforced and abided by as herein written.”

By this section, none of these portions in conflict with the National Labor Relations Act would be carried out. The Board in determining that this provision of the contract is illegal, overlooked a fundamental principle applicable to the interpretation of contracts. That principle is that a contract means what the parties intend it to mean as shown by the language used:

“Generally speaking, the cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. Whatever may be the inaccuracy of expression or the ineptness of words used in an instrument in a legal view if the intention of the parties can be clearly discovered, the court will give effect to it and construe the words accordingly.” 12 Am. Jur. 745.

This contract must be read as a whole and its inten-

tion ascertained from the entire instrument. It must be perfectly obvious that the insertion of Section 11 showed that the parties were perfectly cognizant of the Labor-Management Relations Act of 1947 and contracted in accordance therewith. It is a fundamental principle of law that existing statutes are read into any contract.

“It is commonly said that the existing statutes in the settled law of the land at the time a contract is made, becomes a part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention. This rule is elaborated to the effect that the laws which exist at the time and place of making a contract and at the place where it is to be performed effecting its validity, construction, discharge and enforcement, enter into and form a part of it as if they were expressly referred to or incorporated in its terms.” 12 Am. Jur. 769.

The parties who negotiated this contract understood that parts of it which were in conflict with the Labor-Management Relations Act of 1947 were void and unenforceable insofar as they applied to operations affecting commerce, and Section 11 of the contract shows that they contracted accordingly. The implications of the contract are as much a part of it as though they were expressly written into the language.

It is clearly implied in this case that the contract negotiated by AGC was not to be applied in cases where it was contrary to the Labor-Management

Relations Act. It is perfectly within the language of Section 11 for the employers to hold the contract inapplicable in cases affecting commerce, and in fact, had that interpretation been placed upon the language, there would have been no charge of an unfair labor practice in this case. If there was any violation of the National Labor Relations Act in this case, it was in the application of the contract, not in its negotiation, and there is no liability on the part of AGC for the improper application of the contract by the corporate defendant, E. F. Shuck Construction Co., Inc., over which AGC had no control or, in fact, any contractual relation. In brief, the negotiation of the contract which was AGC's sole participation in the matter charged here was not in itself illegal, but AGC negotiated a contract on behalf of its members which it had a right to negotiate, and its participation in those negotiations cannot per se make its act illegal. There is no showing that the AGC participated in any way in determining the actual manner in which the contract was applied in the case of Kieburztz.

The mere negotiation of a contract on behalf of members of an industry who were both in and out of commerce, which contract, if properly interpreted and applied, would not have resulted in any unfair labor practice within the meaning of the law, cannot be held the basis for financial liability on

the part of the AGC. Had this contract been interpreted to apply the Union Security Clause only to intrastate jobs, there would have been nothing illegal about it. It is only the manner in which it was applied that brought about any contended violation of the act. Since there is no proof that the AGC had anything to do with the manner in which it was applied, it was error on the part of the Board to find liability against the AGC.

(d) That Portion of the Order Dealing With the Posting of Notices Is Unreasonable.

The order of the Board includes a requirement that the AGC posts certain notices at all the jobsites for the E. F. Shuck Construction Co., Inc. (R61 and 62). AGC has no contractual relation with E. F. Shuck Construction Co., Inc., and has no authority to go upon the jobsites of E. F. Shuck Construction Co., Inc., for any purpose. If this order is to be carried out, the AGC will have to go upon sites where it has no right and the order requires it to maintain the signs for a period of sixty consecutive days. Of course the particular job in question was finished long ago, and what jobs or what personnel E. F. Shuck Construction Co., Inc., may now have, does not appear in the record. At least the contract which was involved in this matter has long ago gone out of existence. We submit that it is not reasonable to

require AGC to now undertake to post and maintain signs relating to this moot issue on jobsites where AGC has no right to go and over which it has no control. This is merely another illustration of the impossibility of attempting to impose the liability of employer upon a mere agent.

V. CONCLUSION

It was error for the Board to hold AGC liable for the back pay to Kieburtz, because the AGC was not Kieburtz's employer and Section 2 (2) of the National Labor Relations Act does not serve to place upon every agent of an employer the obligations of an employer with respect to back pay. The AGC itself was not an employer and did not participate in any way in the enforcement or application of the contract, but participated only as the negotiator on behalf of employers and the action of the AGC was completed more than three years prior to the alleged Unfair Labor Practice, and there is no showing that the AGC did anything whatsoever within six months of the time that the alleged unfair labor practice occurred. Likewise, the Government has not established its burden of proof that this local school job affected commerce or that the AGC was associated with the job or the employment of Kieburtz in any such manner as to cast a monetary burden upon AGC, particularly since the evidence

shows that the actual employer, E. F. Shuck Construction Co., Inc., was not even a member of AGC but was merely an employer following the contract negotiated for the industry, but without contractual relationship with AGC in that regard.

Respectfully submitted,

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